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Supreme Court of the United States

October Term, 1937.

No. 779

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

PHILIP L. GERHARDT,
Respondent.

No. 780

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

BILLINGS WILSON,
Respondent.

No. 781

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

v.

JOHN J. MULCAHY,
Respondent.

BRIEF FOR RESPONDENTS.

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DANIEL B. GOLDBERG,
On the Brief.

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BRIEF FOR RESPONDENTS.

The Issues.

The Port of New York Authority is the municipal corporate instrumentality of the States of New York and New Jersey, created by Compact of April 30, 1921, for their joint development of the highways, bridges, tunnels and waterways of an interstate port district. The immediate issue here

is whether or not the Federal government may tax the employees of a state agency engaged in such activities. However the Commissioner makes it clear that his objective is to tax the revenues of the Port Authority itself (Petitioner's Brief, pp. 45, 47, 56), and the interest on its bonds (Stipulation, Record, folio 311).[1]

The Petition for Certiorari conceded that there is no conflict of decisions (p. 29). On the contrary, and on many occasions, the Courts have been unanimous in upholding the immunity of the Port Authority and similar state instrumentalities engaged in the regulation and development of ports, harbors, waterways and highways. The Board of Tax Appeals has so held in eight separate decisions, three of them involving the Port Authority itself.[2] *The Circuit Courts of Appeals for the First, Second and Ninth Circuits and the District of Columbia have so held.*[3] Within the past few weeks a District Court has written an opinion in accord.[4] All of these cases have been accepted by the States as the law for the purposes of financing port, bridge and highway

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[1] For the convenience of the Court, our references to the Transcript of Record are keyed into the original page numbers, which appear in the margin of the Transcript here. Hereafter the abbreviation "R. f." will be used for "Record folio."

[2] *Moisseiff* v. *Commissioner,* 21 B. T. A. 515; *Carey* v. *Commissioner,* 31 B. T. A. 839; *Case* v. *Commissioner,* 34 B. T. A. 1229; *Fitzgerald* v. *Commissioner,* 29 B. T. A. 1113; *Modjeski* v. *Commissioner,* 28 B. T. A. 1051; *Harlan* v. *Commissioner,* 30 B. T. A. 804; *Wait* v. *Commissioner,* 35 B. T. A. 359; *Platt* v. *Commissioner,* 35 B. T. A. 472.

[3] *Jamestown & Newport Ferry Co.* v. *Commissioner,* 41 F. (2d) 920, C. C. A. 1st; *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, C. C. A. 2nd; *Commissioner* v. *Gerhardt,* 92 F. (2d) 999, C. C. A. 2nd, (the instant case below); *United States* v. *King County, Wash.,* 281 Fed. 686, C. C. A. 9th; *Commissioner* v. *Harlan,* 80 F. (2d) 660, C. C. A. 9th; *Halsey* v. *Helvering,* 75 F. (2d) 234, U. S. Ct. App., D. C.

[4] *Boomer* v. *Glenn, Western District of Kentucky,* 21 F. Supp. 766.

improvements which today represent a state investment of billions—a quarter of a billion in the case of The Port of New York Authority alone.

It was upon the authority of two recent decisions of this Court itself that the Circuit Court of Appeals upheld the immunity of the Respondents—*New York ex rel. Rogers* v. *Graves,* 299 U. S. 401 and *Brush* v. *Commissioner,* 300 U. S. 352. The Respondents submit that these two recent decisions of this Court are determinative of the present case. In the *Rogers* case the Court expressly joined *canal, water way, bridge* and *highway* development as immune governmental functions. The *Brush* case went directly to one of the most important functions of the Port Authority when the Court said (pp. 372, 373):

> "A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it; * * * but this does not destroy the claim that the maintenance of the highway is a public and governmental function."

These two decisions confirmed the conclusion reached by respected authority when the Port Authority was first created. Before any of its securities were offered for public sale, it secured the opinion of the Honorable Charles Evans Hughes, after his retirement as Associate Justice and prior to his appointment as Chief Justice. He said (November 10, 1925):

> "The Bonds issued by the port authority for the construction of the two bridges and the income therefrom will be exempt from both Federal and State taxation. * * *
>
> "The immunity of the bonds from Federal taxation follows from the fact that, as already stated, the port authority is a public agency, a governmental instrumentality of the two States. It is explicitly declared to be such in the Act of each State providing for the

> financing to build the two bridges * * *, and this declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established."

The Commissioner cites not a single case in any Court which in any way conflicts with this reasoning. His brief is simply a plea for a reversal of all prior decisions in the field of constitutional immunity. Such a plea is obviously fraught with danger, not alone to the stability of the Port Authority, but also to all state agencies performing similar functions. It is a plea which undermines that certainty which is the essence of a government of laws.

We submit that the *Brush* and *Rogers* decisions completely encompass the state functions here at issue and are conclusive as to the governmental character of the functions exercised by the States of New York and New Jersey through the Port Authority. There is, therefore, no question here of "extending the constitutional exemption." (See *Helvering* v. *Mountain Producers Corporation,* No. 600, Present Term, decided March 7, 1938.) Port and highway developments have always and universally been accepted as essentially governmental. Such activities are clearly inside the orbit of this Court's decisions in the field of reciprocal governmental immunities. To tax them in the case of the Port Authority would impose a direct burden upon a governmental instrumentality of two States and would directly tax their revenues and properties.

Statutes.

For the convenience of the Court, the Clerk has been furnished with additional bound copies of Stipulation Exhibit E (R. f. 284), being the Sixth Edition with Supple-

ment of the compiled statutes of The Port of New York Authority. This Exhibit contains the Port Compact of 1921 between the States of New York and New Jersey (pp. 9-28), the Comprehensive Plan of the two States for the Development of the Port of New York, enacted as a part of the Compact (pp. 30 and 33), and other Port Authority legislation referred to in this brief. The Clerk has also been furnished with additional copies of Stipulation Exhibit B (R. f. 282), the "Joint Report with Comprehensive Plan and Recommendations of the New York, New Jersey Port and Harbor Development Commission."

Statement of Facts.

Proper application of the law can be made in this case only through a *complete* presentation of the facts. The history of the governmental problems faced by the States in the development of the Port of New York, and the story of their efforts to solve those problems make up the sum and substance of these cases. The nature of the Port Authority's functions is to be found in the reasons for its creation. That history and those reasons receive but cursory attention in the Commissioner's brief, which, therefore, does not accurately reflect the true picture of the Port Authority and its work.[1] We present the real picture as compactly as possible in the following statement, relying upon the Stipulation of Facts (R. f. 276 to 340) and the Board's Findings of

[1] Three independent judicial tribunals have recently discussed the creation and the nature of the Port Authority. Their findings and conclusions are so different from those offered here in the statement of the Commissioner that we refer to them for comparison: *Bush Terminal Co.* v. *The City of New York*, 152 N. Y. Misc. 144, 147 to 152 (1934); *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 518 (1935); Findings of Fact below, R. f. 44 to 72 (1936).

Fact below (R. f. 44 to 72).[1] This record completely supports the conclusion of the Courts below that the Port Authority is a governmental agency engaged in carrying out sovereign and necessary functions of government.

The governmental problem faced by the States of New York and New Jersey in the development of the Port of New York is the direct result of the port's geography, of its tremendous concentration of population and commerce, and of its division into two states and over two hundred separate municipalities (Stip. of Facts, R. f. 277 and Stip. Ex. B, pp. 5, 6). These basic factors of geography, population, and political division are the factors which make the development of the port and harbor of New York a unique and extraordinary governmental problem (Stip. of Facts, R. f. 277; Findings of Fact, R. f. 47, 48).[2]

About one tenth of the entire population of the United States lives in the port district. It includes the financial and industrial center of the country. It is the focal point of our national transportation system. More than half of the Nation's foreign commerce enters or clears through the Port of New York (Stip. Ex. B, pp. 1, 2).

Although its magnificent natural harbor and the resultant forces of world commerce brought about this development of the Port, its haphazard growth and the lack of proper

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[1] No challenge of any kind is addressed to the Findings of Fact. Their binding effect need not be restated. *Helvering* v. *Rankin*, 295 U. S. 123, 131; *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 206. The Court's most recent statement is that findings affirmed below are unassailable if resting upon substantial support. *Alabama Power Co.* v. *Ickes*, 82 Law. Ed. Adv. Ops. 263, 266.

[2] A map of the Port of New York area, indicating particularly the boundaries of the Port District as established by the Compact of 1921 and the principal political subdivisions of the area, is appended to this Brief.

planning gave rise to intolerable conditions of waste and congestion. These conditions endangered health, welfare and economic security of the people of the two States (Findings, R. f. 47, 48; Stip. Ex. B, pp. 1-40).[1] The story of the Port Authority is a chronicle of the States' efforts to correct these conditions.

The Treaty of 1834.

The background of the port problem is found in the history of the Port of New York. The early colonization as a Dutch trading post, the development of the port under British rule, its rise to world prominence during the Napoleonic wars, the development of steam navigation and the opening of the Erie Canal are all factors in the complete port picture. However, within the limitations of this brief, we must turn to the factors which brought about the Treaties of 1834 and 1921 between the States of New York and New Jersey.

With the establishment of the packet lines and the development of the clipper ships in the early Ninteenth Century, world commerce began to converge upon New York. The Erie Canal was finished in 1825. With its opening, settlers in the West began trading eastward through the Canal

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[1] In the report of the Board of Engineers of the War Department, on the Port of New York published by the Government Printing Office in 1926, and approved by the Chief of Engineers, United States Army, it is said (Part I, p. 384):

> "New York will always be a great world port. With proper future planning, coordination, and management it will retain much business it may otherwise lose. Its task is to improve and coordinate its immense facilities; to conceive of itself always as not only a center of population and industry but as a national gateway, with responsibility to the Nation to make itself a port having the most reasonable charges, the quickest dispatch, and the most efficient service."

to the Hudson River and the Port of New York. *New York Harbor Case,* 47 I. C. C. 643, 656.

With the growing economic importance of the harbor waters, New York and New Jersey found themselves in a conflict of interests. The Port District, though commercially and economically a geographical unit, was cut in two by a political boundary line. Though the interests of the people in the two States were ultimately dependent upon the unified development of the port, their provincialism frequently led to short-sighted competition. Controversies arose over harbor franchises, ferry rights, jurisdiction over the harbor islands and boundaries. Acts of reprisal were passed and at one time the two States were "almost on the eve of war." See the argument of counsel, *Gibbons* v. *Ogden,* 9 Wheat. 1, 184.

The Treaty of 1834 effectively settled the early quarrels of New York and New Jersey over the port area. It established the boundary line in the middle of the harbor and the Hudson River, giving New York jurisdiction over the waters of the harbor and the river to the low water line on the Jersey shore (Stip. Ex. B, p. 42). The paramount importance of the development of the Port of New York to welfare of the people of the port district has been stressed in almost every case involving the construction of the Compact of 1834. Thus in *Ferguson* v. *Ross,* 126 N. Y. 459, 465, Judge Andrews wrote:

> "The citizens of New York City may possibly have a greater stake in the matter than the citizens in other localities, but the destruction or serious impairment of the harbor of New York would directly affect the prosperity of the state. It would impair its revenues, imperil its system of river, canal and railroad transportation, and it is not too much to say that every industrial

interest, agricultural or mechanical, would feel its blighting influence."

However, the construction of the Camden and Amboy Railroad, the first railroad to enter the port district, two years before the signing of the Treaty of 1834, foreshadowed the passing importance of the inland waterways to which New York had primarily owed its early development and growth. The great rivers which emptied into New York Harbor had been a vital factor in the growth of the port, but after 1832 they became also one of the great natural barriers to American transportation—*for the largest city in the world is separated from the mainland of the United States by the waters of the Hudson River and New York Harbor.*

The Growth of the Port.

The Compact of 1834 dealt only with boundaries and territorial jurisdiction. But the subsequent growth of American industry, the coming of the railroads and the automobile, the mounting volume of foreign commerce—requiring greater, more modern and efficient use of the port's waterways and highways—all brought about new port problems and economic conflicts of tremendous scope, calling for the joint exercise of the sovereign powers of both States. Accordingly, it is stipulated here (Stip. R. f. 278):

> "That prior to and in the year 1916 the States * * * found themselves faced with the problem of the port's future development.
>
> "That by reason of the fact that * * * the bay and harbor of New York, constituted and formed the political boundary of two States * * * it has been necessary that any action that has been taken by the two states

for the development of the port as a whole, be joint action by the two states."[1]

The great era of railroad building brought the convergence of the rails of the nation upon the Port of New York. However, it was physically impossible for the rails to reach the City itself. They were blocked on the Jersey shore—and with them was halted the supply of food, fuel, and other vital necessities of life in the metropolis, save for uncertain and wasteful lighterage across the harbor (R. f. 371, 372, 426; *New York Harbor Case,* 47 I. C. C. 643, 649, 651, 670). While the port district owes its development primarily to its harbor waters and its rivers, they are not an unmixed blessing. In hard winters, these waters are clogged with ice, and the supply of necessities is interrupted. Fog, too, is a constant menace (Findings R. f. 61; R. f. 424-426).[2]

With the increase in population and commerce, it became apparent that the lighterage and ferriage of freight—indeed, the entire terminal system of the port area—were wholly inadequate. This system—or, as it was found, lack of system—left to the mercy of the elements the health, welfare, and even the lives of ten million people (See R. f. 47, 371, 372, 426). Congestion in the harbor waters and in the streets about the railroad terminals became an ever increasing menace (R. f. 430-437). Furthermore, the costliness of this antiquated system was reflected in mounting costs of living (R. f. 399, 400, Stip. Ex. B, pp. 1, 2). The unified development of the Port had never been properly planned; it had failed to

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[1] See also the recitals of the Compact of 1921, Stip. Ex. E, pp. 13, 14; Findings of Fact, R. f. 44, 46; Commissioner's Brief, p. 3.

[2] The importance of tunnels and bridges to transport supplies for the port district's ten million people, when ice, fog and other marine disturbances interfere with water transportation, was pointed out also in the *Hell Gate Bridge Case,* 144 I. C. C. 514, 525.

keep pace with the physical development of other ports (Findings R. f. 47, 48, Stip. R. f. 278; Stip. Ex. B, pp. 1 to 40; *New York Harbor Case*, 47 I. C. C. 643, 653-656).

Finally, in 1916, the States of New York and New Jersey found themselves faced with the cumulative problem of the port's future development (Stip. R. f. 278). They saw that this density of population, the enormous concentration of commerce, and the resulting traffic congestion, necessitated the prompt creation of coordinated and efficient port and highway facilities. For seventy years, the two States had countenanced the slow and uncertain shuttling of freight by ferry across the harbor waters to and from the railheads on the Jersey shore. They had permitted their most valuable waterfront properties to become cluttered with railroad pier stations, to the exclusion and loss of steamship traffic drastically in need of pier space (*New York Harbor Case*, 47 I. C. C. 643, 732, 733, 739; Stip. Ex. B, pp. 278, 345, *et seq.*; R. f. 371 to 374). No adequate provision for the motorization of vehicular traffic had been made. This new and constantly growing traffic so congested the streets of the port district that many had become well nigh impassable (R., f. 430 to 435).[1] Lack of vehicular bridges and tunnels, of coordinated freight handling facilities and terminals, of express highways and modern piers—all resulted in confusion, delay and economic waste (Findings R. f. 47, 48; Stip. R. f. 279; Stip. Ex. B, pp. 1-40).[2]

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[1] Since that time the traffic problem has become more intensified. "A Survey of Traffic Flow on the Principal Highways of New York," Information Bulletin No. 41, The Regional Plan Association, New York City.

[2] For judicial recognition of these facts, in addition to the *New York Harbor Case*, 47 I. C. C. 643, see *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515; *Bush Terminal Co.* v. *The City of New York*, 152 N. Y. Misc. 144, 148.

These conditions ultimately gave rise to two movements: the building of interstate vehicular crossings, and the creation of a port authority by interstate compact.

The first of these crossings was the Holland Tunnel. It was a pioneer experiment in interstate highway construction, particularly because of the ventilation problem. It cost fifty million dollars. After referendum New Jersey elected to meet her half of the contribution by state bond issue (Chap. 262, Laws of New Jersey, 1924). The bonds were to be repaid out of tolls collected from the users of the tunnel. New York paid for its half of the cost by appropriations out of its treasury (Stip. R. f. 303). Title to the tunnel is vested in the two States. Legislation directs how the revenues of the tunnel shall be applied (Chap. 421, Laws of New York, 1930; Chap. 247, Laws of New Jersey, 1930; R. f. 305).

The New York—New Jersey Port and Harbor Development Commission.

The Holland Tunnel, of course, was but a beginning. The more general problem of port coordination had been forcefully brought to public attention in 1915 when, after study by several legislative commissions (Stip. R. f. 278-279), the Governor of New Jersey appointed a committee to institute a proceeding before the Interstate Commerce Commission, known as the *New York Harbor Case,* 47 I. C. C. 643 (Findings R. f. 47). That case sought a revision of railroad freight rates in favor of New Jersey. It aroused great opposition in New York (Stip. R. f. 279; Findings R. f. 47). The Interstate Commerce Commission was quick to see that the real problem was not so much one of freight rates as one requiring complete reorganization and coordination of

Port facilities. What the Port faced was, in effect, a war of conflicting interests between two sovereignties which could be settled amicably only by interstate cooperation and compact (Cf. Stip. R. f. 278). The Interstate Commerce Commission's Report was primarily an exposition of the inadequacy of the port's facilities and the imperative demand for joint state action in the solution of a problem which had an important bearing, not only upon their own, but also upon the commerce of the whole nation (47 I. C. C. 643, 653, 732, 733, 759). The Commission said:

> "The complainants' contention that the methods of handling both domestic and export traffic at the port of New York must be thoroughly revised if the maximum of efficiency is to be attained is abundantly established by the evidence of record. * * * A large part of the valuable waterfront on the New Jersey shore, now used almost wholly for the transfer of freight between the rails and the floating equipment, could be released for other and more suitable purposes; the congestion on the west side of Manhattan Island caused by the assembling of countless vehicles at the crowded piers to receive and discharge freight would be considerably relieved; and the pier stations on the Manhattan shore, now taxed to capacity, could be devoted in part to other uses.
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> "* * * It is necessary that the great terminals at the port of New York be made practically one, and that the separate interests of the individual carriers, so long an insuperable obstacle to any constructive plan of terminal development, be subordinated to the public interest.* * *" (pp. 732, 733.)
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> * * *
>
> "The difficulty of attaining a physical coordination of facilities at the port, and administering them as an organic whole, is attributable in part to the nature of the harbor and to the fact that the opposite sides of the port lie in different states. * * * That part of the port lying west of the Hudson River is in the state of New Jersey, and the fact that the port is thus divided into

> two parts by a state line cannot be overlooked by those who would understand its history and the problem confronting those who are interested in its development." (p. 653).

As a direct result of the great public interest in the port problem aroused by the *New York Harbor Case* and as the result of the admonitions of the Interstate Commerce Commission, the two States created the New York, New Jersey Port and Harbor Development Commission.[1] They appropriated $450,000 for its work, and directed it to make a comprehensive survey of port and harbor conditions and to recommend proper and adequate remedies, together with constructive plans for the port's development (Findings R. f. 47; Stip. R. f. 279-280).

Indeed, the Interstate Commerce Commission in the *New York Harbor Case,* took official cognizance of the fact that New York and New Jersey had already begun to cooperate in this manner, saying (47 I. C. C. 643, 738, 739):

> "* * * in considering the situation here presented, the Commission cannot with propriety overlook the fact that bills have been introduced in the legislatures of the states of New York and New Jersey providing for the appointment by the governors of those commonwealths of state commissioners to study jointly the situation at the port and make appropriate recommendations, 'to the end that the said port shall be efficiently and constructively organized and furnished with modern * * * piers, rail and water and freight facilities, and adequately protected in the event of war'."

No adequate picture of the problem which the States faced, nor of the solution they devised, can be placed before this

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[1] Chapter 426, Laws of New York, 1917 and Chapter 130, Laws of New Jersey, 1917.

Court without quotations from the Joint Report of the New York, New Jersey Port and Harbor Development Commission, (Stip. Ex. B, pp. 1-7, 26, 27, 31 and 35). After pointing out the serious port situation and the tremendous movements of commerce "required to carry on the business of the port and to sustain the life and health of its inhabitants," together with the modern facilities that were urgently required, the Commission said:

> "The Port has indeed gone to unmatched lengths in providing many of these facilities. But it has not kept pace with the demands and there has never been any general comprehensive plan for terminal developments of the Port considered as a whole to which all parties interested have subscribed or toward the realization of which all, municipal and private, have cooperated. In consequence the flow of goods has become more and more irregular, terminal costs have mounted and the burden of congestion and expense presents a situation needing immediate correction.
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> "This is not merely a problem for the concern of public officials, directors of railroads, steamship companies and other terminal enterprises. It is a great sociological problem of chief concern to the public at large. A heavy burden is thrown upon the commerce of the Port and adds to the cost of living. The public feels the oppressiveness of this burden but is unable to analyze its causes, which, however, can and should be removed. (Joint Report, p. 1.)
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> * * *
>
> "The first necessity of the Port District is its daily food supply. Following this closely in importance is the supply of manufactured necessities, such as clothing and furniture, and of raw materials from which it can produce these and other necessities and luxuries, both to supply its own population and to keep goods moving in the channels of trade. In short, the ability of New York to function as a great port depends first of all on its ability to feed and clothe its own population and to provide its merchants and manufacturers with the trans-

portation they require to do business successfully. Until it serves itself it can not adequately serve others." (Joint Report, p. 7.)

The Report finally recommended an interstate compact resolving the conflicting interests of the two States, and setting up legal machinery through which their cooperation could be made effective and continuous. It pointed out the necessity for creating an agency which should have a new borrowing capacity to meet the enormous demands of port reorganization, since the cities and States were already so overburdened with public debt that they could not undertake the improvements themselves. (Stip. Ex. B, pp. 36-38.) It was recognized, therefore, that in addition to the usual powers of government commissioners the members of the proposed port body would require a municipal corporate form. The proposal for self-liquidating projects, with its necessary segregation of revenues for repayment, demanded the efficiency and insulation afforded by the corporate form.[1]

The report of the New York, New Jersey Port and Harbor Development Commission contains a detailed account of the steps taken by the two States in arriving at the final form of the Compact (Stip. Ex. B, pp. 436, 437). Legislative Commissions from each State were appointed, and they made careful study of the work done by the Port and Harbor Development Commission itself. Public hearings were held, the various municipalities were heard, and revisions of the draft of Compact were made (Stip. Ex. B, pp. 436, 437). The public demand for the Compact, its support by the Governors and their messages to the Legislatures, and the final

[1] This method has become well recognized in governmental fiscal policies. See Nehemkis and Williams, Municipal Improvements As Affected By Constitutional Debt Limitations, 37 Columbia Law Review, 178, 201.

adoption by both States, are adequately covered by the Findings of Fact and the Stipulation in these cases. (Findings, R. f. 44-49; Stip. R. f. 281-285.)

In his annual message to the Legislature on January 1, 1936, Governor Lehman of New York said:

> "The Port of New York Authority was established in 1921. And it is important to recall the unique situation that gave birth to it. In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the imperative demand for a continuing body with ample powers to meet the problems arising out of the commerce and the operations of the two States lying within the Port District."

The Port of New York Authority.

The Compact itself is part of the Record (Stip. Ex. E, pp. 13-28). After recitals of the sovereign purpose of the action and of the necessity for the cooperation of the two States through a joint agency, the States supplemented and amended the Treaty of 1834 with the following pledge:

> "Article I.
>
> "They agree to and pledge, each to the other, faithful cooperation in the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof." (Stip. Ex. E, p. 14.)

Everything the Port Authority has done is in fulfillment of this pledge.

After creating the Port Authority as a body corporate and politic and their common agency, with general powers of port development, the Compact directed it to prepare a plan for the comprehensive development of the Port of New York

(Stip. Ex. E, p. 21). In 1922 such a plan was submitted by the Port Authority and adopted by the two States (Stip. Ex. E, pp. 30-33). The States declared it "binding upon both States with the same force and effect as if incorporated" in the Compact (Stip. Ex. E, p. 21). It was sanctioned by Congress on July 1, 1922, with the finding that (Public Resolution No. 66—67th Congress, H. J. Res. 337; Stip. Ex. E, p. 45):

> "* * * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation."

The statutory Comprehensive Plan sets forth the principles to govern the development of the Port. The governmental purpose behind those principles is clear—the development of interstate port, harbor, bridge, highway and waterway facilities, the elimination of highway and traffic congestion, and the promotion of the health and welfare of the people of the Port District. The Plan provided for the unification of terminal operations in the port area (Stip. Ex. E, pp. 34-35). It directed that:

> "highways for motor truck traffic should be laid out so as to permit the most efficient inter-relation between terminals, piers and industrial establishments not equipped with railroad sidings and for the distribution of building materials and many other commodities which must be handled by trucks; these highways to connect with existing or projected bridges, tunnels and ferries." (Stip. Ex. E, p. 35).

Provision is made for the construction of tunnels and bridges, "the location of all such tunnels or bridges to be

at the shortest, most accessible and most economical points practicable, * * * providing for and taking account of all reasonably forseeable future growth in all parts of the district." (Stip. Ex. E, p. 37).

Section 8 of the Comprehensive Plan authorizes and directs the Port Authority "to proceed with the development of the port of New York in accordance with the said comprehensive plan as rapidly as may be economically practicable" and vests the Port Authority

> "with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State, to effectuate the same, except the power to levy taxes or assessments." (Stip. Ex. E, p. 43).

This grant of plenary powers is instinct with a recognition of the governmental character of the functions of the Port Authority. It clothes the Port Authority with every power that could be delegated by the two States, with the sole exception of the power to levy taxes and assessments. This single reservation was, in effect, a direction that the Port Authority's work should be self-liquidating, placing the cost and burden of public improvements upon the shoulders of those who use the facility rather than upon the shoulders of all taxpayers. This is the "Authority Plan."

Section 8 of the Comprehensive Plan further authorizes all municipalities within the District to cooperate in the effectuation of the Plan and vests them with such powers as may be appropriate or necessary so to cooperate. It specifically provides that:

> "The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *" (Stip. Ex. E, p. 44).

Following the provisions of Article XI of the Compact (Stip. Ex. E, p. 21), the Comprehensive Plan has been supplemented, from time to time, by additional plans for the development of the Port District.

The Work of the Port Authority 1921-1938.

General Port Development.

The Port Authority has now been carrying forward the States' program for seventeen years. During that time, it has provided the Port with bridges, tunnels and terminals. It has worked continuously on a program of port coordination, promotion and development. The attempt to segregate certain of the Port Authority activities as "the inconsiderable portion * * * which deal with the development of the Port" (Commissioner's Brief, p. 38) indicates a misunderstanding of the entire program of Port development. We have shown that all the powers of the Port Authority emanate from the "planning and development of the port of New York" (Compact, Art. I). The Port Authority's bridges, terminals, highways and tunnels are all integral parts of a single Comprehensive Plan of port development—and the Commissioner has stipulated here that each one of those projects was undertaken "in partial effectuation of the Comprehensive Plan for the development of the Port of New York" (Stip. R. f. 290, 291, 294, 297, 303, 307, 316).[1]

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[1] However, there seems to be some confusion as to the Commissioner's position on this point. In the reference noted above he takes the position that (a) port development is an *inconsiderable* portion of the Port Authority's work. He has stipulated, (b) that *all* the Port Authority's projects are "in partial effectuation of a Comprehensive Plan for the development of the Port of New York." On page 18 position (c) is taken, that the Port Authority "*has not undertaken any* projects to develop the harbor of New York in any way!" (Italics ours.)

The Board found that (R. f. 73):

> "The Port Authority is organized for and operating in the traditionally sovereign function of protecting, improving and developing the Port of New York; *and all its activities are directed to and are incident to that end.*" (Italics ours.)

The Port Authority's bridges and tunnels, particularly the George Washington Bridge, the Holland Tunnel and the new Lincoln Tunnel are nationally known. But equally important are the following activities in studying, regulating and coordinating the facilities of the Port and protecting its economic interests:[1]

(a) The Port Authority is constantly engaged in studies of necessary channel improvements, the establishment of anchorage areas, of pier and bulkhead lines, and in the determination of clearances for overhead bridges, or subaqueous tunnels and pipe lines, in order to accommodate and plan

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[1] A disinterested commentary on the work of the Port Authority is found in "The Public Authority: Some Legal and Practical Aspects", by Peter R. Nehemkis, 47 Yale Law Journal 14, at 30, 31, as follows:

> "• • • The Port of New York Authority alone has succeeded in carrying out a scientifically determined program of regional planning. Under unified management and control the Port Authority has provided an economically adequate solution to the harbor, bridge, tunnel, railroad, and freight distribution problems of the New York metropolitan area. In the sphere of planning the Port Authority has served a two-fold purpose: it has provided a mechanism for consultation among various local governments for the development of integrated programs of related activities, and in the interstate sector of its operations it has projected blueprints for the development of broad-guage harbor, port, communication and traffic facilities. In short, through a functional adaptation of the public corporation The Port of New York Authority is effectively bridging the hiatus which exists between economic and political spheres of government."

for the normal development of world shipping at the Port (Findings R. f. 62; see also Stip. R. f. 325; R. f. 395).

(b) Pursuant to the powers vested in the Port Authority to make suitable rules and regulations for the improvement and conduct of navigation and commerce (Stip. R. f. 325), the Port Authority has forwarded such studies and recommendations. As an instance, it has held public hearings on the subject of free storage time allowed to freight on steamship piers (Findings R. f. 62; R. f. 446-448). Following these hearings, legislation was introduced in both States providing for the regulation of such practice by the Port Authority. This legislation has already been passed in New York (Chapter 711, Laws of New York, 1935) and is pending in New Jersey.

(c) At the request of municipalities, the Port Authority has investigated and reported on such matters of regional concern as the establishment and location of foreign trade zones. The Port Authority's facilities are at the disposal of municipalities in the port area for such assistance, and are given gratuitously as one of the general duties of port development (Findings R. f. 62; R. f. 440-443).

(d) The Comprehensive Plan directs the Port Authority to "cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said Comprehensive Plan" (Stip. Ex. E, p. 43). Numerous studies have been made, and assistance given to the highway departments of the states, in accordance with this direction. Elaborate studies have been made of the origin, destination and volume of traffic using

interstate highways. In the engineering and financial aspects of linking up the interstate bridge and tunnel plazas with the connecting highways of each state, the Port Authority dovetails its plans with those of the state highway officials (R. f. 404, 406-410). As we shall show (*infra*, p. 34), in addition to the construction of its interstate bridges and tunnels and their immediate approaches, the Port Authority has spent approximately $36,000,000 in the construction of free public highways connecting up the main traffic arteries of the two state highway systems.

(e) The food supply and terminal markets of the Port District have received extensive consideration. Assistance was rendered to the City of New York in its plans for relief of terminal market congestion of perishable foods. The Port Authority presses the solution that shipments of these commodities from all railroads be consolidated at a limited group of three or four market piers, constituting in effect a union produce terminal (R. f. 393, 394).

(f) The Port Authority takes a leading part in defending the Port against discriminatory freight rates, and eliminating other barriers to the free flow of commerce (Findings, R. f. 62, 63). The Port Authority's trained staff of experts is engaged in the protection of the Port against diversion of traffic due to inequitable freight rates, pursuant to the direction of Article XIII of the Compact (Stip. Ex. E, p. 22). In conferences with the Railroad Traffic Associations and the United States Maritime Commission, and in formal litigation before the Interstate Commerce Commission and the United States Shipping Board, the legal and technical staff of the Port Authority are constantly engaged in presenting

and defending the States' interests in the development of the Port (Findings R. f. 63; Stip. R. f. 329; R. f. 450 to 454).

(g) The Port Authority has forwarded a progressive unification of existing railroad facilities in the interest of lower costs of living and doing business, and of lower freight handling costs through the port district. (Findings R. f. 57, 60, 62; R. f. 399, 400.) In one instance, a thirteen mile stretch of tracks along the New Jersey waterfront between Bayonne and Edgewater (designated in the Comprehensive Plan as Belt Line No. 13) was unified after detailed studies by the Port Authority, extensive negotiations with the carriers, and hearings before the Interstate Commerce Commission. Track hauls of 13 miles replaced circuitous hauls of over 100 miles; rates were simplified with great savings to the shippers of the Port District (R. f. 335-338).

(h) As a result of exhaustive studies of marine operations of the railroads in New York Harbor, the Port Authority effected the pooling of tugs and other marine equipment. Accordingly, a unified Railroad Marine Service was established for the harbor in 1933 (Findings R. f. 62; R. f. 396-398).

(i) One of the principal causes of port waste and inefficiency is the rivalry between railroads to secure strategically favorable competitive positions. The Interstate Commerce Commission called attention to the necessity of consolidating shipments and unifying terminal facilities at the Port of New York (*New York Harbor Case,* 47 I. C. C. 643, 732, 733). The efforts of the Port Authority to eliminate the

duplication of facilities brought about by these rivalries have already proved effective, even though gradual in achievement.[1] The inland terminal system (*infra,* p. 26) is an outstanding instance. In 1935 the Port Authority cooperated extensively with the Federal Coordinator of Transportation. At his request studies, reports and recommendations were prepared and submitted to him.

The foregoing represent but a few typical port functions which are continuously administered in the general furtherance of the Comprehensive Plan.[2] The Commissioner's attempt to belittle these activities by asserting that they require but a small part of the Port Authority's revenues proposes an unsound test for measuring the relative importance of the various phases of the Port Authority's work in port development. The testimony of Respondent Billings Wilson, (R. f. 367-470) Assistant General Manager of the Port Authority in Charge of Operations, reveals that about two-thirds of his time and effort is spent on the type of activities above discussed. It is the work of the operating executives which truly characterizes the work of the Port Authority. The bridge and tunnel portion of the port development program requires large operating and maintenance expenses,

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[1] The obstacles which have delayed the coordination of these facilities are evidenced by the President's recent appointment of a Special Committee (New York Times, March 18, 1938, page 1) consisting of the Chairman of the Interstate Commerce Commission and Commissioners Eastman and Mahaffie to consider *inter alia,* the "establishment of a Federal Authority to compel railroad managements to coordinate or consolidate terminal and other facilities to eliminate wasteful competition and expenditure * * *."

[2] For a more complete list see Petitioner's Brief, page 39, footnotes 14 and 15.

but those expenses represent only a departmental phase of the port program. Naturally, less money is spent on the work of planning port facilities than in actual construction and operation to effectuate those plans.

The port functions summarized in this section return no monetary revenues, though their return to the general welfare of the people of the port district is substantial. Their purpose, as found by the Board below, (Findings R. f. 62) is:

> "* * * to improve transportation conditions, reduce living costs and enable the Port of New York to meet the competition of other ports, * * *."

Inland Terminals.

The Commissioner attempts to portray a port authority, two of whose main functions are the operation of a "commercial" building and an "interstate bus line." This is a distortion of the facts. In the Commissioner's presentation, nothing is said about the purpose of the inland terminal system and its place in the Comprehensive Plan, save that it is "a part of the Port Authority's plan to coordinate transportation facilities and to reduce congestion." Throughout his description of Inland Terminal No. 1 (Brief, pp. 13-15), there is not a word about the problem of freight distribution in the Port District, not a word explaining street, highway and waterfront congestion, not a word about the years of earnest effort devoted to the solution of this ever-increasing problem, not a word explaining the plan of action which the States finally adopted, not a word about the method by which the States financed the Terminal, and not a word about the results the States are achieving through the Inland

Terminal plan. No—these facts of record are omitted. The only "description" of the Terminal is a detailed discussion (Brief, p. 14) of the incidental use of the space over the Terminal. And on the basis of that "statement," the conclusion is suggested that Inland Terminal No. 1 is merely a commercial office building, and "clearly * * * of a proprietary character" (Brief, p. 34).

The construction of inland terminals is a fundamental part of the entire Comprehensive Plan (See Stip. Ex. E, p. 42). Such terminals are the real key to the solution of the whole problem of freight distribution in the Port District. The Commissioner, however, chooses to discuss neither the problem nor the solution.

Yet, it is stipulated, and the Courts below found as facts (Findings R. f. 57) that:

> "The Port Authority has extensively studied the port district's system of transportation, highway and terminal facilities and methods of handling freight used by the railways, ferry companies and other transportation agencies, and has sought methods of remedying street, highway, and waterfront congestion within the district. In its reports, which are made annually or more often, it advised the governors and legislatures of both states that it was taking steps to remedy the congestion by an *integrated and coordinated system of union inland freight terminals* at various points in the port district, and it has been assisted in these projects *by state appropriations and requisite legislation.*" (Italics ours.) (See also Stip. R. f. 315.)

It is stipulated, and the Courts below found as a fact that "The project received the approval of the Governors and Legislatures" of both States (Findings R. f. 58; Stip. R. f. 316, 317). After reviewing the purposes of the Terminal and

the method of its operation (Findings R. f. 58, 59), the Board below concluded that:

> "The union terminal has lightened traffic congestion and effected substantial savings to merchants in time and trucking costs, * * *."

The need for the Inland Terminal system and its beneficial results appear in the record (Stip. R. f. 315-316; R. f. 371-394; 436-438). Each of the competing trunk-line railroads having its terminus on the New Jersey shore, transported its freight over the river by lighters and carfloats to and from its own individual pier stations on the Manhattan waterfront (R. f. 372). "Shippers were obliged to deliver packages for different railroads to their separate pier stations and likewise to collect in-bound freight from these widely separated points" (R. f. 386-387; Findings R. f. 59). This necessitated long hauls, duplication of trucking and excess handling (R. f. 436-437). It caused tremendous congestion on the City's streets, increased the accident toll, and added to the cost of all freight clearing through the Port of New York (Stip. R. f. 315-316; R. f. 430-431, 436; R. f. 386, 438).

> "The necessity of using car floats and lighters between the New Jersey terminals and the stations and piers on the New York side was the cause of very serious congestion of vehicles in the streets leading to the stations and piers where incoming freight was unloaded and outgoing freight assembled. The consequent cost of picking up and delivering freight assumed such proportions that it was found that the cost of handling freight through New York terminals was equivalent to the line-haul cost from New York to Buffalo. Constant complaints and agitation against the high cost of handling freight at New York resulted and it became a matter of imperative economic necessity to take drastic measures for the purpose of remedying the intolerable

situation which existed." *Bush Terminal Co.* v. *City of New York,* 152 N. Y. Misc. 144, 148.

It was to meet these conditions that the Inland Terminal system was adopted by the two States. That system utilizes the Port Authority's interstate vehicular crossings and its union inland freight station. By the use of these tunnels the tremendous expense of actually bringing the rails under the river to Manhattan has been avoided. The system's operation is described in the record (R. f. 373, 379-380). The railroads transport all less-than-carload freight by motor truck to a single union inland terminal, either directly from the New Jersey railheads through vehicular tunnels, or from the New York pier stations. At the terminal it is sorted out upon one immense platform and each consignee in the Port District may by a single trucking operation pick up all the freight consigned to him on that day. Unlike the old pier station system he need no longer call at many congested waterfront piers. Similarly, a New York shipper may transport all his freight, even though it is to be shipped by different railroads, to the single union inland terminal station. It is there sorted out and delivered through vehicular tunnels, by fully loaded trucks, along with the freight of other shippers, to the New Jersey yards of each of the trunk-line railroads (Findings R. f. 59; R. f. 379-380). The effect of this system in relieving traffic congestion and in reducing the cost of commodities is noted by the Board (Findings R. f. 59), and is borne out also in the Findings of the New York Supreme Court in *Bush Terminal Co.* v. *City of New York,* 152 N. Y. Misc. 144, 151:

"A large amount of duplication of trucking has been eliminated, not to mention the enormous saving of time and expense effected."

We have already pointed out that one of the fundamental purposes of the States in selecting an authority as their instrument of port development, was to insulate the financing of the port program and establish it on a self-liquidating basis. As to the Inland Terminal itself, it is stipulated that the two States (Stip. R. f. 316):

> "* * * empowered the Port Authority to construct such terminals on a self-liquidating basis as parts of the Comprehensive Plan."

The Port Authority was given power to issue bonds, but was obliged to plan public projects in such manner as would insure sufficient income to meet the expenses of operation and maintenance as well as interest and sinking fund requirements (Findings R. f. 60). Unless the Port Authority could demonstrate to purchasers of its bonds that a particular project was self-supporting, it would be unable to raise the moneys necessary to finance that project, and the terminal system could never be effectuated. On analysis the problem of carrying out the mandate of the two States was found to present these considerations:

(a) A properly designed terminal required an immense ground area to accommodate a maximum number of trucks around the freight platforms (R. f. 378).

(b) Manhattan real estate was the most expensive in the world—and the terminal required *four acres* of it (R. f. 381).

(c) There was no way of meeting that cost out of terminal operations alone (R. f. 381).

(d) A one story terminal could not be self-supporting on a $3,500,000 real estate cost (R. f. 381).

(e) Anything in excess of a nominal charge on freight would defeat the entire purpose of the system (R. f. 400).

(f) The Port Authority had no power to compel the railroads to use the new terminal system (R. f. 399).

(g) The railroads would only use the terminal if they could be shown that it would be cheaper for them than their old pier stations (R. f. 381).

In this many-horned dilemma, the only way in which the states could obtain the urgently needed inland terminals on the required self-liquidating basis was to make use of the surplus air rights over the Terminal itself, for the production of incidental revenue (R. f. 383). The Board clearly recognized this when it found (Findings R. f. 60):

> "Its construction and rental were deemed necessary to provide sufficient revenue to make the terminal facility economically practical, for the Port Authority received no subsidy for the terminal from the states, and had to raise its $16,000,000 costs by bonds. To sell the bonds it was necessary to show sufficient prospective revenue from the project to make them attractive."[1]

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[1] The findings of fact on this point, made by the Supreme Court of the State of New York in *Bush Terminal Co.* v. *The City of New York*, 152 N. Y. Misc. 144, completely paralleled those of the Board below. Incorporated in the New York Supreme Court's decision in that case are these findings:

> "28. That the construction, operation and maintenance of the upper stories of said Inland Terminal Building was and is vitally and essentially connected with and is a necessary and inseparable part of the construction, operation and maintenance of the Inland Terminal Station on the ground and basement floors of said building and that the Port Authority in the construction of the entire building acted solely in the public interest and in accordance with the mandate and the purposes of the Compact and of the Comprehensive Plan.
>
> "29. That the said upper floors are merely incidental to the Inland Terminal Station and that without those floors it would have been economically impossible to construct the Inland Terminal Station, pursuant to the Compact, the Comprehensive Plan and the statutes herein referred to. That the dominant object of the Inland Terminal Building, including the construction of said upper floors, was its use for terminal purposes."

In constructing the Inland Terminal the Port Authority was careful to limit the number of the upper stories so as to produce just enough revenue to meet the inevitable operating deficits of such a public facility, and to place it on a self-liquidating basis (R. f. 383-384). That the Inland Terminal is maintained today purely as a public service is indicated by the fact that, even without any allowance for amortization, it operated in 1935 at a net loss of $336,361.68 and in 1936 at a net loss of $39,653.01.[1] This despite the incidental revenue obtained from the rental of the upper stories.

Of these upper stories, the two top floors are utilized entirely for the executive, administrative and engineering offices of the Port Authority itself, a use which is, of course, necessary to the performance of its duties (R. f. 459).

The character of the upper stories of Inland Terminal No. 1, as incidental to a governmental purpose, is paralleled by the operations of the Panama Rail Road Company in *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401. This Court concluded (p. 404):

> "In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered *not as things apart, but in their relation to the Panama Canal;* and it is clear that the railroad and ships, after the completion of the canal, continue to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?" (Italics ours.)

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[1] Sixteenth Annual Report of the Port Authority to the Governors and Legislatures of the States of New York and New Jersey, page 55.

The parallel of Inland Terminal No. 1 is expressed by the Board below (R. f. 75, 76):

> "This is said in respect of the rents from the Inland Terminal Building, more particularly the upper stories * * *. If these were independent profit-making ends in themselves, the argument would be more engaging. But these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of improving the port and terminal facilities of the port district. * * * The Inland Terminal Building was not constructed to produce rent as a profit on investment, but to provide a more efficient terminal and thus expedite traffic and relieve highway congestion."

Interstate Highways.

The enormous task of linking up the highway systems of the two States by vehicular crossings of the Hudson River and the Staten Island Kills was committed to the Port Authority when, in 1920, the New York-New Jersey Harbor Port and Development Commission found (Stip. Ex. B, p. 31):

> "Highway communication between different sections of the Port is a part of the problem, * * * and one to which the Port Authority can well give attention. The main thoroughfares must be adequate, as in present instances they often are not, to carry the truck traffic the developments will induce. Where waterways intervene means of crossing them must be found, and this will naturally lead to the consideration of ferries, vehicular tunnels and bridges. Crossing the majority of the wider waters of the Port by any of these means usually involves at least two municipalities directly, while other municipalities more remote from the waters may be prospective beneficiaries of the contemplated improvement. Therefore provision of suitable highway access to the different sections of the Port becomes a problem, and

an important one, for a joint agency such as the Port Authority."

The Comprehensive Plan incorporated this recommendation of the Joint Commission as one of the principles that should govern the development of the Port (Stip. Ex. E, pp. 35-37). The amazing increase of motorized vehicular traffic has intensified the necessity of constructing state highway systems linked by vehicular bridges and tunnels.

In 1923 the Governors of the two States advised the Port Authority that bridges and tunnels linking the highways of New York and New Jersey should be constructed at the earliest possible moment, and that such highway facilities should be constructed by the Port Authority (Findings R. f. 50; Stip. R. f. 288).

Accordingly, the Port Authority went forward with studies of traffic conditions, engineering problems and construction costs; it held public hearings, and finally made full reports and recommendations to the Governors and Legislatures of the two States (Findings R. f. 50; Stip. R. f. 288-290).[1]

In going forward with this program of bridge and highway construction, the Port Authority carried out also an extensive project of express highway facilities both in New York and in New Jersey, linking up the state highway systems with the interstate crossings. These express highways cost $36,000,000. They are a part of the free public highway systems of both States and are used by both local and

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[1] The Port Authority's "Report on Vehicular Tunnels and Bridges", dated December 21, 1933, and rendered to the Governors and Legislatures of the two States, is contained in the Port Authority's Annual Report for the year 1923 (Stip. Ex. G), at pages 43 to 49.

through traffic, as well as by bridge and tunnel traffic. (R. f. 406-410, 469).[1]

In support of this entire bridge and tunnel program, as well as of all other projects and activities of the Port Authority, the two States have contributed, both in outright appropriations and in advances, over $20,000,000. For over ten years the two States appropriated $200,000 a year to the Port Authority's support (Stip. R. f. 324, 325; Compact Art. XV). The Commissioner states (Brief, p. 17) that such sums "were not invested by the States in the enterprise, but were merely loaned to the Authority and must be repaid to the two States." But the very Stipulation reference he gives in support of that statement contradicts it. It says (Stip. R. f. 308, 309):

> "The projects of the Port Authority have been financed in part by outright appropriations of the States of New York and New Jersey; in part by direct advances of the States of New York and New Jersey, * * *."

The George Washington Bridge.

The statutes directing the construction of the George Washington Bridge[2] recited that this bridge was to be constructed "in partial effectuation of the comprehensive plan for the development of the port of New York," and they

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[1] For the convenience of the Court, in making clear the Record references to the location of the Port Authority's interstate crossings and their integration of the highway systems of both States, we have appended to this brief a map entitled "Location of Principal Crossings and Arterial Highways in Port District."

[2] Chapter 41, Laws of New Jersey, 1925; Chapter 211, Laws of New York, 1925; Chapter 6, Laws of New Jersey, 1926; Chapter 761, Laws of New York, 1926; Stip. R. f. 294; Ex. E, 107, 138, 147, 168.

provided that the bridge should be built and paid for by the issuance of the Port Authority's bonds or other securities pursuant to the Compact. The States granted to the Port Authority the right to use and occupy so much of their real property as might be necessary for the construction and maintenance of the bridge, including the lands under the waters of the Hudson River (Section 6, Chapter 41, Laws of New Jersey, 1925; Section 6, Chapter 211, Laws of New York, 1925). They vested in the Port Authority powers of eminent domain, and each advanced $250,000 for the making of surveys, engineering studies and other preliminary work (Section 11, Chapter 41, Laws of New Jersey, 1925; Section 17, Chapter 211, Laws of New York, 1925). Subsequently, the States made further advances of $9,800,000 for construction purposes (Findings R. f. 52; Stip. R. f. 295).

An elaborate system of state highways running back from the bridge head in New Jersey was constructed by the Port Authority, and in New York a system of approach ramps and high speed vehicular tunnels was constructed practically across the width of Manhattan Island (Findings R. f. 52; R. f. 406-410). The total cost of the bridge was $60,000,000. It was financed, over and above the advances of the two States, by the sale of Port Authority bonds.

The net income of the George Washington Bridge cited by the Commissioner (Brief, p. 10) is entirely consumed in the statutory funds set up by the two States for amortization of the cost of the bridge. When the cost of the project has been met, any revenues must be held for such purposes *as may be directed by the two States* (Section 2, Chapter 48, Laws of New York, 1931; Section 2, Chapter 5, Laws of New Jersey, 1931; Stip. Ex. K).

Hudson River Vehicular Tunnels.

We have heretofore referred to the construction of the Holland Tunnel by the two States through Joint Commissions (*supra*, p. 12). In 1930 the States determined that the control and operation of the Holland Tunnel should be vested in the Port Authority as a part of the Comprehensive Plan (Findings R. f. 55-56; Stip. R. f. 303, 304). The tunnel revenues were to be pledged first to raise $50,000,000 (which the Port Authority did raise and turned in to the two States) to relieve the then pressing burden of taxation. They were, in addition, to be used to support other bridges and tunnels connecting the two States, to be built and operated by the Port Authority. Without these Holland Tunnel revenues the other Port Authority projects could not be self-supporting. (Findings R. f. 56; Stip. R. f. 304-305; R. f. 405, 406).

At the same time, they authorized the Port Authority to proceed with the construction of a new Midtown Hudson tunnel, and agreed upon a policy of group operation of the Port Authority's bridges and tunnels within the Port District. These acts effectuate a bi-State determination that there is but a single traffic movement between the two States in the Port District, and that the movement of vehicles using one bridge or tunnel is facilitated by the existence of every other bridge and tunnel (Findings R. f. 55, 56; Stip. R. f. 304-305).

The first tube of this new Midtown Hudson tunnel (called the Lincoln Tunnel) has just been opened for operation. The States appropriated $400,000 to the construction of this project. This was an outright appropriation and not a loan, contrary to the Commissioner's statement on page 17 of his Brief. (Findings R. f. 56; Stip. R. f. 306-308).

Express highway connections for the Lincoln Tunnel extend for a distance of approximately three miles over the Palisades to connections with the principal state highway systems. These highways were constructed by the Port Authority at a cost of $19,864,000 and are to be conveyed to the New Jersey State Highway Department. In New York the Port Authority constructed two new metropolitan avenues extending from 34th to 42nd Streets on the west side of Manhattan (R. f. 408, 409).

Funds for the Lincoln Tunnel were, in the first instance, advanced by the Federal Emergency Administration of Public Works, in the amount of $37,500,000. This loan to the Port Authority was made under an agreement pursuant to which the Federal Government took the position that it was satisfied that the Port Authority was "exempt, under the Constitution of the United States as now in force, from any and all taxation * * * now or hereafter imposed by the United States of America or by the States of New Jersey or New York" (Stip. R. f. 313).[1]

The Staten Island Bridges.

Staten Island is completely isolated from the surrounding mainland by the waters of the Bay and of the various Kills which separate it from the New Jersey shore. The two Legislatures therefore directed the Port Authority to construct

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[1] Footnote 6 on page 12 of Petitioner's Brief infers that our statement of this matter is not in accord with the facts of record. We need only refer to the Commissioner's own Stipulation at folio 313 of the Record, and the language of the Loan Agreement, Stipulation, Exhibit L, there referred to, pages 4 and 5. The Stipulation states that the Loan Agreement with the United States required an opinion of Bond Counsel to the effect that the Port Authority's bonds were exempt, as a condition to the purchase of any such bonds by the Government. Section 5a

three vehicular bridges from Staten Island to the Jersey mainland (Findings R. f. 52; Stip. R. f. 290, 291, 297). The States advanced $8,300,000 toward the construction of these bridges. The remaining $26,000,000 was raised by Port Authority bond issues (Findings R. f. 51-52).

The net operating loss on these Staten Island Bridges for the years 1931 to 1934, without any consideration of amortization requirements, totalled $1,311,203.09. These losses, together with the necessary amortization payments, were met ultimately out of the revenues of the Holland Tunnel, under the plan of pooling the revenues of these interstate facilities (Findings R. f. 56; Stip. f. 305; R. f. 416).

The Commissioner attempts to give the impression (Brief, p. 13) that one of the Port Authority's principal functions, coordinate with all of its bridge, tunnel and port development functions, is the operation of a bus across the Goethals Bridge. The fact is that the operation of this bus is of a most trivial and temporary character.[1] Prior to 1931, sev-

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of Stipulation, Exhibit L, defines "Bond Counsel" as counsel "satisfactory to the Government". Section 6c of the Loan Agreement states that any requisitions submitted by the Port Authority for purchase by the Government be accompanied by such final opinions of Bond Counsel, as well as by similar opinions of the Port Authority's General Counsel. The Stipulation (R. f. 313) declares that the Government should be under no obligation to purchase any of the Notes unless it was satisfied with those opinions. It further states (R. f. 313) that such opinions were furnished and were accepted by the Government. The Secretary of the Interior indicated the reliance of the Government upon the Hughes Opinion in his address at the dedication of the Lincoln Tunnel. New York Times, December 22, 1937, p. 28.

[1] Since the Commissioner raises the matter (Br., p. 16) we suppose we must explain also that the income which the Port Authority receives from "sales of gasoline, tire changes", consists of service fees to motorists stalled in the Holland and Lincoln Tunnels, where the ventilation problem is such that human life is in danger by blockage of traffic.

eral private buses had been compelled to cease operations over this bridge through "lack of patronage and financial instability" (Stip. Ex. G; Port Authority Annual Report for 1931, p. 54). In order "to keep the service alive" and "also with a view of keeping employed surplus employees who would otherwise be released" (Port Authority Annual Report, p. 54, *supra*), the Port Authority bought "three second-hand White buses" and kept the operation going. The Port Authority's Annual Reports show that for the years 1931 to 1935, this service was kept going in spite of annual deficits that ran from $1,000 to $9,000. Even these figures are simply operating figures and do not take into consideration the cost of the buses. In 1937 these buses accounted for a net operating revenue of about $600 as compared with a revenue for all Port Authority facilities of over $5,500,000, or one one-hundredth of one percent (.01%)! The capital invested in the buses is about $10,000 as compared with a capital investment in all Port Authority facilities of approximately $257,000,000 or four one-thousands of one percent (.004%)!

In concluding our statement of the facts, we note that one of the Commissioner's principal points appears to be that the Port Authority should be deemed proprietary because of its receipt of operating revenue (Br., p. 32). Reference to *Brush* v. *Commissioner*, 300 U. S. 352, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, should be enough to dispose of this contention. (See *infra*, pp. 53, 54).

Upon the facts found by the Courts below and stipulated by the parties, we therefore submit that there can be no escape from the conclusion reached by the Board below (R. f. 73, 76):

"The Port Authority is organized for and operated in the traditionally sovereign function of protecting, improving, and developing the Port of New York; and all its activities are directed to and are incident to that end.

"* * * these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of improving the port and terminal facilities of the port district * * *. The essential question of the preservation of the states' sovereign powers in the interplay of our dual government may not be lost sight of by a pursuit of each detail of the method of exercising it as if it stood alone with a different history and a different purpose."

Summary of Argument.

The Commissioner's brief raises three questions: (1) whether the activities of the Port Authority are proprietary; (2) whether the Port Authority, created by interstate compact, is an agency of the States alone; and (3) whether Federal regulation of interstate commerce impairs the immunity of the Port Authority.

In the following reply on behalf of the Respondents, *Points I, II, III and IV* are addressed to the Commissioner's first question. *Point I* presents the direct precedents, particularly the recent decisions of this Court, in support of the constitutional immunity of port and highway development. *Points II, III and IV* deal with governmental character of the Port Authority's activities *de novo,* through a pragmatic inquiry into the necessity for its creation, its character as an agency of government, and the tradition and history of governmental development of ports and highways. *Point V,* answering the Commissioner's second question, defends the sovereign character of state action through inter-

state compact. *Point VI* shows that Federal regulation of interstate commerce cannot destroy the immunity of state instrumentalities from Federal taxation. *Point VII* makes it clear that the activities of the Port Authority do not constitute the withdrawal of any normal sources of Federal revenue.

I. All precedents, particularly the recent decisions of this Court, affirm the constitutional immunity of the States in the development of ports and highways. *Brush* v. *Commissioner,* 300 U. S. 352, and *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, expressly declare that waterway and highway developments, the functions of the Port Authority, are immune. The Circuit Courts and the lower Courts have unanimously upheld the immunity of these functions.

II. The public purpose which required the creation of the Port Authority proceeded from a determination by the States of New York and New Jersey that a serious port problem threatened the health, safety and standard of living of the people of the Port District. They determined that the problem was the result of conflicting interests and improper coordination of port, terminal and highway facilities; and that its solution required cooperation through a common governmental agency which could go forward with a comprehensive plan of port and highway development.

III. The status of the Port Authority as a governmental instrumentality of the two States is evident from its nature and attributes and from the control which the States exercise over it. It is declared by the States to be "a body corporate and politic", "the municipal corporate instrumental-

ity of the two states", and their "joint or common agency." The Courts have repeatedly determined that it is a part of the machinery of the State governments.

IV. Governments have universally exercised the functions of developing their ports, bridges and highways as traditional governmental duties. All precedents and authorities testify to the exercise of these functions by governments from the earliest times. They are among "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

V. Congressional consent to a compact does not destroy the constitutional immunity of a bi-state agency exercising governmental functions. In entering into a compact the States do not surrender their sovereignty, and an agency so created is no less an agency of the States alone. The requirement of Congressional consent has but the effect of removing a political barrier to the exercise of sovereign powers inherent in the States.

VI. Federal regulation of interstate commerce does not impair the immunity of the Port Authority. The decisions of this Court establish the immunity of many state functions which are nevertheless subject to Federal regulation. To argue that the interstate commerce power destroys state immunity is to confuse the Federal regulatory power with its power to tax for revenue. The operation of an interstate bridge does not constitute interstate commerce. Furthermore, the States are sovereign in interstate commerce where Congress has not preempted the field. The entire constitu-

tional doctrine of reciprocal immunity arises from the fact that there can be no *absolute* sovereignty in the American form of government.

VII. Taxation of the Port Authority would impose a direct financial burden on the two States. The revenues of the Port Authority are State revenues. A Federal tax would prevent the return by the Port Authority of State advances, might compel the States to resume annual port appropriations called for in the Compact, and would reduce the value of the States' ownership of Port Authority properties.

The functions of the Port Authority do not constitute a withdrawal of any normal sources of Federal revenue. In contrast with other instrumentalities which have appeared before this Court, such as the Panama Rail Road Company and the New York Department of Water Supply, the Port Authority takes the place of no former taxpayer.

POINTS OF LAW.

POINT I.

All precedents, particularly the recent decisions of this Court, affirm the constitutional immunity of the States in the development of ports and highways.

There would appear to be no necessity at this Term of the Court to restate the accepted principles of constitutional immunity which prevent the States from taxing the Federal Government, and the Federal Government from taxing the States, their instrumentalities and agencies. Each of the decisions in this field handed down during this Term has

emphasized the Court's acceptance and affirmance of that doctrine as a basic constitutional necessity "in order to maintain the essential freedom of government in performing its functions." *James* v. *Dravo Contracting Co.*, 82 Law. Ed. Adv. Ops. 125, 134; *Helvering* v. *Therrell*, 82 Law. Ed. Adv. Ops. 537; *Helvering* v. *Mountain Producers Corporation*, No. 600, October Term, 1937, decided March 7, 1938.

We therefore take it as the law of this Court that an employee of an instrumentality of state government, engaged in the performance of a governmental function, is immune from Federal taxation;[1] that the principle is reciprocal to state and federal governments;[2] and that where it applies it is absolute.[3]

A constitutional issue cannot be more definitely settled than is the issue here, by the authorities relied on as conclusive in the opinion of the Circuit Court below. *Brush* v. *Commissioner*, 300 U. S. 352, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, are complete authority for the principles upon which the Circuit Court rested its decision. They are decisive because (a) they expressly assume the immunity of that class of functions in which the Port Authority is engaged—waterway and highway development, and (b) they suggest tests to determine the governmental character of

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[1] *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Dobbins* v. *Commissioners*, 16 Pet. 435 (1842); *Collector* v. *Day*, 11 Wall. 113, 125, 127 (1870); *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401 (1937); *Brush* v. *Commissioner*, 300 U. S. 352 (1937).

[2] *Collector* v. *Day, supra; New York ex rel. Rogers* v. *Graves, supra; Brush* v. *Commissioner, supra.*

[3] *Collector* v. *Day, supra*, at page 127; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 584; *South Carolina* v. *United States*, 199 U. S. 437, 451, 452.

state or federal functions which definitely place the Port Authority *within* the line of "historical and judicial inclusion."[1]

Brush v. *Commissioner,* 300 U. S. 352, was a reversal of a Circuit Court decision. Though the Circuit Court had denied the immunity of the City of New York in providing its people with a public supply of potable water, that Court had not the slightest doubt as to the governmental immunity of a state agency engaged in port development. It said (85 F. (2d) 32, 35):

> "* * * the furnishing of water has been classed as non-essential to the exercise of governmental functions. * * * Our decision in Commissioner v. Ten Eyck, 76 F. (2d) 515, was controlled by the traditional supervision exercised by government over sea ports and stands apart from the decisive features here."

So too, when the case came to this Court, the opinion selected as a typical example of an immune governmental function the construction and operation of a highway—one of the principal functions of the Port Authority.

> "A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it * * *; but this does not destroy the claim that the maintenance of the highway is a public and governmental function." *Brush* v. *Commissioner,* 300 U. S. 352, 372.

Even the dissenting opinion in the *Brush* case is, we submit, instinct with recognition of the immunity of such functions as port and highway development. The dissenting Justices were of opinion that municipal waterworks should be

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[1] Point I has to do only with reason (a). The application of the tests suggested in reason (b) is treated in Points II, III and IV.

taxed, because they considered them (p. 377) to be a "state business" which "ought to bear its proportionate share of taxation in order that comparison may be made between the cost of conducting public and private business." It would appear that the Justices had in mind the widespread private development of waterworks. But certainly the very converse is true in the development of ports, bridges and highways. In the language of the dissenting Justices, these functions "have no analogue in the conduct of a business * * * but are both peculiar to and essential to the operation of government." There is no comparable private "business" of port and highway development to invite cost comparison. See *Sherman* v. *United States,* 282 U. S. 25, 29.

In *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, the Court held immune the great waterway development of the Federal Government—the Panama Canal. It held also immune the Panama Rail Road Company, the operations of which include the provision of harbor terminal facilities at the ports at Colon and Panama City.[1] In these cases, the States of New York and New Jersey present the case for the immunity of *their* greatest waterway development—the Port of New York.

In the *Rogers* case, the Court expressly joined *canal, waterway, bridge* and *highway* development as immune governmental functions (pp. 404, 406):

> "The question, therefore, to be answered is whether the canal is such an instrumentality of the Federal Government as to be immune from state taxation; * * *.
>
> "The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium

[1] Annual report of the Secretary of War, 1937, page 18.

> by and through which commerce is regulated, since such creation and use condition and facilitate transportation."[1]

In his opinion of November 10, 1935, Hon. Charles Evans Hughes refers to the statutory declaration of the two States that "the port authority shall be regarded as performing a governmental function",[2] and declares:

> "this declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established. In this view, the bonds issued by the port authority will be on the same footing as state and municipal bonds issued for governmental purposes and are not subject to taxation by the Federal Government (*Collector* v. *Day,* 11 Wall. 113; * * *)."

There has been no more thorough judicial exposition of the governmental nature of port and harbor development by state agencies than that contained in the opinion of the Circuit Court of Appeals in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515. The Court reviewed the universal acceptance, both by the Federal and the State governments, of the development of ports and navigable waters as essentially governmental (p. 517); it showed that historically and universally port

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[1] Furthermore the *Rogers* case firmly established the authority of government to select any instrumentality it chooses and pointed out that from the immunity of such instrumentality "it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune" (p. 408). This statement of the Court in so recent a case is sufficient in itself to dispose of the question reserved by the Commissioner and numbered "(4)" on page 22 of the Government's Petition for Certiorari; whether, "if the Port Authority itself is immune from Federal taxation, this immunity operates to exempt its employees from a non-discriminatory income tax."

[2] N. Y. Laws of 1925, Chap. 210, Sec. 7; N. J. Laws of 1925, Chap. 37, Sec. 7.

activities were and are the usual subject of governmental operation and control (p. 518); it reviewed the judicial authorities that had held them such and discussed The Port of New York Authority itself as an example of the "importance, as a governmental desire, of the proper development and operation of the Port of New York" (p. 518). The Circuit Court concluded (pp. 517, 519):

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people * * *.
>
> "The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not withdrawing sources of revenue from the federal taxing power."

The Commissioner recognizes and admits that there is no conflict in the decisions upholding the immunity of port, bridge and highway development as sovereign functions of the States. They are unanimous. The Circuit Courts of Appeals for the First and Ninth Circuits, and for the District of Columbia, are in full accord with the decisions of the Second Circuit, as are the District Court decisions and the entire series of decisions of the Board of Tax Appeals.

The Circuit Court of Appeals for the First Circuit in *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. (2d) 920, 923, held a municipal ferry immune because as the Court said, it "was, in function, not distinguishable from a bridge or other necessary portion of a highway".

In 1922, the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *King County, Wash.*, 281 Fed. 686, upholding the immunity of the county ferry, said (p. 688),

> "We understand it to be the duty of the government, whether national, state, county, or city, to provide suit-

able roads, bridges, and ferries for the convenience of the public, and that when such a government undertakes to do so, and to itself operate them, it is in the exercise of a strictly governmental function."

And, in 1935, the same Circuit Court held that an employee of the Golden Gate Bridge and Highway District was immune, *Commissioner* v. *Harlan,* 80 F. (2d) 660, saying: "That the maintenance of highways, and consequently of bridges and ferries connecting the same, by the government or its subdivisions, is the exercise of an essential governmental function is so well established that we content ourselves with a reference to a few of the numerous decisions to that effect."

Similarly, the Court of Appeals for the District of Columbia, in *Halsey* v. *Helvering,* 75 F. (2d) 234, 235, held:

> "* * * the official duty of the taxpayer as township engineer was to advise the town government in all engineering matters, specifically including the construction, maintenance, and alteration of streets and ways, * * *
>
> "We are of opinion that such work is essentially a governmental function, and the compensation paid by the township to its officers engaged therein is properly exempt from federal taxation."

Most recently the District Court for the Western District of Kentucky, in *Boomer* v. *Glenn,* 21 F. Supp. 766 (1938) upholding the immunity of an employee of the Louisville Bridge Commission, pointed out that "The construction and maintenance of highways and bridges as a governmental function is one of the most ancient known to the law having had its beginning prior to the civil or common law. * * * This case falls clearly within *Brush* v. *Commissioner,* 300 U. S. 352."

The decisions of the Board of Tax Appeals upholding the immunity of the employees of the port, harbor, bridge and highway Authorities and Commissions are: *Moisseiff* v. *Commissioner,* 21 B. T. A. 515; *Modjeski* v. *Commissioner,* 28 B. T. A. 1051; *Fitzgerald* v. *Commissioner,* 29 B. T. A. 1113; *Harlan* v. *Commissioner,* 30 B. T. A. 804; *Carey* v. *Commissioner,* 31 B. T. A. 839; *Hittell* v. *Commissioner,* 33 B. T. A. 276; *Case* v. *Commissioner,* 34 B. T. A. 1229, (the instant case below); *Wait* v. *Commissioner,* 35 B. T. A. 359; *Platt* v. *Commissioner,* 35 B. T. A. 472.

In the *Brush* and *Rogers* cases this Court considered and rejected every argument advanced by the Commissioner on this point. Yet, in spite of those decisions the Commissioner persists in making the argument that the Port Authority is proprietary (a) because it is engaged in a "transportation service" (Brief, p. 32); and (b) because it charges tolls for the services it renders, from which it derives revenues to repay the cost of its projects—here labelled "profits" (Brief, pp. 32-35).

We concede that it may properly be said that the Port Authority furnishes a transportation service to the public, and that its bridges and tunnels are transportation facilities. Transportation is, of course, of the essence of port development. However, we can imagine no better phrase than "transportation facility" to describe the Panama Canal, or the railroad and steamships of the Panama Rail Road Company. That phrase describes state highways, though their operation is declared, in the *Brush* case, to be a governmental function. It describes, too, the operation of the Federal and State canal systems, and is a perfect characterization of the work of the Post Office Department.

The Commissioner, of course, exerts every effort to apply *Helvering* v. *Powers*, 293 U. S. 214, to these cases. The distinction is obvious. In the *Powers* case, the Court was dealing with the operation of an elevated railroad which had theretofore been privately operated, and which was to be returned to private operation and to the ownership of its private security holders after ten years of municipal operation. Even more broadly, Chief Justice Hughes in the *Powers* case makes it clear that the Court limits the immunity of state operation of such transportation facilities to those in which the state is "undertaking a business enterprise of a sort that is normally within the reach of the Federal taxing power and is distinct from the usual governmental functions * * *." Here there is involved no "business." When Mr. Justice Holmes considered the port development activities of the California Board of State Harbor Commissioners in the development of the Port of San Francisco, he said:

> "* * * the work is done without profit for the purpose of facilitating the commerce of the port, and the funds received after paying expenses go to the Treasury of the state to the credit of the San Francisco Harbor Improvement Fund. California has not gone into business generally as a common carrier, but simply has constructed the Belt Line as an incident of its control of the harbor—a state prerogative." *Sherman* v. *United States*, 282 U. S. 25, 29.

The *Powers* case has, therefore, no application to the governmental development of waterways and highways, functions expressly declared immune in the *Brush* and *Rogers* cases.

> "Neither *Ohio* v. *Helvering*, 292 U. S. 360, nor *Helvering* v. *Powers*, 293 U. S. 214, relied upon by respond-

> ent, is in point. What has already been said distinguishes those cases from the one now under consideration" *Brush* v. *Commissioner,* 300 U. S. 352, 373.

The *Powers* case was expressly distinguished from port development cases by the Courts below (R. f. 75, 76. See also R. f. 481, citing *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515). In the *Ten Eyck* case, the Court, after referring to *Helvering* v. *Powers,* said (p. 519):

> "It is the entrance into a trade enterprise that distinguishes these cases, relied upon by the petitioner. It cannot be maintained that there is involved in the instant case a trade or business, entered into for profit, constituting a proprietary enterprise."

The factual differences between the "transportation facilities" held immune in the *Brush* and *Rogers* cases, and the "transportation facility" held taxable in the *Powers* case, are brought out also in Points IV and VII of this brief. These differences lie principally in the governmental history and universality of the function, and in the fact that, in the case of the Port Authority, there is no withdrawal of established sources of Federal revenue.

The Commissioner suggests (Brief, pp. 34, 35) that the collection of tolls and revenues makes the Port Authority proprietary, though he *admits* at the same time, that "the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. * * * to facilitate the flow of traffic through the District." He expands this argument into the contention that the Port Authority is "selling" transportation service for "profit." We need only point out in the language of this Court that:

> "Respondent contends that the municipality, in supplying water to its inhabitants, is engaged in selling water for profit; and seems to think that this, if true,

> stamps the operation as private and not governmental in character. * * * to say that, because the city makes a charge for furnishing water to private consumers, it follows that the operation of the water works is corporate and not governmental, is to beg the question. What the city is engaged in doing in that respect is rather rendering a service than selling a commodity. If that service be governmental it does not become private because a charge is made for it, or a profit realized. A state, for example, constructs and operates a highway. It may, if it choose, exact compensation for its use from those who travel over it (See Bingaman v. Golden Eagle Western Lines, 297 U. S. 626); but this does not destroy the claim that the maintenance of the highway is a public and governmental function. * * * The federal Post-Office Department charges for its services; but no one would question the fact that its operation calls into exercise a governmental function." *Brush* v. *Commissioner*, 300 U. S. 352, 372, 373.

See also *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, and *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 519.

The contention that the Port Authority earns "profits on a grand scale" is *totally incorrect*. The figures which the Commissioner refers to are simply net income over and above operating and interest charges on a public investment of over $250,000,000. *They are entirely consumed in amortizing the cost of these designedly self-liquidating public works.* (See R. f. 53). The Annual Reports of the Port Authority show that the net income was insufficient, in any of the years referred to, to return the advances which the Port Authority has received from the two States. In fact, estimates of future traffic indicate that revenues will be barely sufficient to meet sinking fund requirements. If there were any surplus over and above amortization requirements, it would be held subject to the absolute disposal of the two States (Stip. Ex. K; Laws of New York, 1931, Chap. 48; Laws of New Jersey, 1931, Chap. 5).

As we have heretofore noted, a great portion of the Commissioner's presentation of the activities of the Port Authority is addressed to the operation of the Goethals Bridge buses and the upper stories of the Inland Terminal. As to the trivial nature of the bus operation, nothing further need be added (*supra*, pp. 39, 40). The incidental character of the upper stories of the Terminal have also been fully developed in our presentation of the facts (*supra*, pp. 32, 33). They are to be considered not as things apart but in their relation to the entire port and highway development Plan.

The cases are in accord that, once it is shown that the primary function is governmental, the incidents necessary to the effectuation of that function are also entitled to immunity. Since port and harbor development are governmental functions, this Court has written the answer to the Commissioner's entire contention as to the upper stories of the Terminal, when, in *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406, the Court said:

> "Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves co-operating regulators—or, perhaps, more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the interrelation of the railroad company's activities with the management and operation of the canal."

Recent reports indicate that these facilities, there held immune, reported a net income to the United States of $1,519,629.[1] This income helped to offset the Government's loss in the operation of the Canal itself. The facts here show that

[1] Annual Report of the Secretary of War, 1937, at page 19.

the upper stories of the Terminal are operated solely as an incident of the Terminal itself and as a source of incidental revenue designed to make the Terminal self-liquidating. In the words of this Court (299 U. S. at 407):

> "We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations."

So, also, in *Brush* v. *Commissioner*, 300 U. S. 352, 371, the Court said:

> "Certainly, the maintenance of public schools, a fire department, a system of sewers, parks and public buildings, to say nothing of other public facilities and uses, calls for the exercise of governmental functions. And so far as these are concerned, the water supply is a necessary auxiliary, and, therefore, partakes of their nature. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401."

The same conclusion was reached by the Circuit Court of Appeals in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 517, 519, and by the New York Supreme Court in *Bush Terminal Co.* v. *The City of New York*, 152 N. Y. Misc. 144, 155, 156.

POINT II.

The public necessity which required the creation of the Port Authority was the necessity of joint State action in the development of their port and their interstate highways.

Point I presented the arguments for the immunity of the Port Authority strictly from the standpoint of precedent. However, even if there were no decisions in point, the same conclusion is reached *de novo*, by applying the pragmatic method of inquiry which this Court adopted in the *Rogers* and *Brush* cases and, more recently, in *Helvering* v. *Therrell*, 82 Law. Ed. Adv. Ops. 537. "We said that what is a public use may depend on the facts surrounding the subject; * * *" (*Brush* v. *Commissioner*, 300 U. S. 352, 366, 367). As we read those cases, there are three major questions—three principal lines of factual inquiry—considered and followed by this Court in arriving at a decision as to whether a given function is governmental or proprietary.[1] They are:

(a) *What were the public necessities which required State or Federal action?*

(b) *Is the agency selected truly an instrumentality of government?*

(c) *To what extent have governments exercised the function?*

To these three lines of inquiry we therefore address Points II, III and IV of our brief. The Commissioner (Brief, p. 35)

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[1] The Commissioner rejects these factual tests. In their place, he attempts (Brief, p. 41) to raise the adjectival method which we had thought was disposed of in *Brush* v. *Commissioner*, 300 U. S. 352, 361.

disputes the value of our first inquiry, that with regard to the public necessities and purposes for the creation of the Port Authority. Obviously, that inquiry alone will not answer the question. However, we propose to follow it, just as did this Court in the *Brush* and *Rogers* cases, as one of the three basic elements which, *when taken together,* establish the governmental nature of any activity of a state agency.

In answer to the first inquiry, therefore, we submit that the public necessity which required the creation of the Port Authority was the necessity for joint State action in the development of the Port of New York. As clearly appears from the Findings and the Stipulation herein, the States of New York and New Jersey were faced with a public problem which not only demanded solution but required joint state action. The Courts below found as a fact (Findings, R. f. 46):

> "This Compact, which amended and supplemented a former one entered into between New York and New Jersey in 1834, was induced by the necessity, widely recognized, for joint state action in the development as a whole of the Port of New York, which lies partly within the jurisdiction of each state."

The history of events preceding and leading up to the creation of the Port Authority make it clear that such a finding of necessity was inescapable (*supra,* pp. 9-16). Accordingly, it is stipulated herein (Stip. R. f. 278) and the Commissioner's Brief (p. 3) concedes that

> *"It has long been recognized that a coordinated development of the port was necessary and that this could not be accomplished by separate action of the two states."* (Italics ours.)

It is stipulated that in 1916 the two States "found themselves faced with the problem of the Port's future develop-

ment" (Stip. R. f. 278). It is stipulated that the *New York Harbor Case,* 47 I. C. C. 643, "aroused considerable public discussion of the problems involved, including discussions of the desirability of a revision in the methods of handling the port traffic, the desirability of unifying the port's transportation system, and such efforts as might be desirable upon the part of both states to effectuate the reorganization" (Stip. R. f. 279). And it is stipulated that the Port and Harbor Development Commission "thoroughly carried out" its survey and recommended "an interstate compact to provide a bi-state corporate agency, to carry out a comprehensive plan of port and harbor development under the direction of the two states" (R. f. 280). Finally, the Commissioner (Brief, pp. 34, 35) affirms that "the basic purpose of the Port Authority is not to earn money but to improve transportation facilities. * * * it may be admitted that a basic purpose of the Port Authority's creation and of the operation of the bridges and tunnels is not to earn profits but to facilitate the flow of traffic through the district."

The necessities requiring State action were stated by the Report of the New York State Joint Legislative Committee on State Fiscal Policies, submitted to the Legislature December 27, 1937 (p. 82):

> "The first important authority established in this country was The Port of New York Authority, which was created by joint action of the States of New York and New Jersey and was called into being because of the necessity of performing certain public functions within a single economic unit, which unit, however, was hopelessly divided by political jurisdictions."

Governor Lehman, in his Annual Message to the Legislature, on January 1, 1936, summed up the governmental necessity for the creation of the Port Authority as follows:

> "In developing the Port of New York, we were faced with dual political sovereignty. Neither New York nor New Jersey could regulate the Port. And so, the Authority was conceived in response to the *imperative demand* for a continuing body with ample powers to meet the problems arising out of commerce and the operations of the two states lying within the Port District." (Italics ours.)

The observations of the Circuit Court of Appeals on the necessity for the creation of the Port Authority are expressed in *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 518:

> "The necessity of a comprehensive plan for the organization and development of port facilities in the principal harbors of this country has been recognized, and steps have been taken to vest in the control of properly constituted governmental agencies the future development of many of its ports. * * * It resulted in the creation of the Port of New York Authority. *This action was a recognition of the importance, as a governmental desire, of the proper development and operation of the Port of New York.*" (Italics ours.)

In *Brush* v. *Commissioner,* 300 U. S. 352, this Court found that the purpose of the City's Department of Water Supply was the conservation and distribution of an adequate supply of pure and wholesome water for "the health and comfort of the city's population of seven million souls" and "as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants" (p. 371). The necessities which compelled action by the two States in the solution of their port problem are a close parallel. The Port Authority, too, was created to "protect the health, safety and lives of its inhabitants." The declaration of the two States is (Sec. 14, Chap. 4, Laws of New Jersey, 1931 and Sec. 14, Chap. 47, Laws of New York, 1931):

> "The construction, maintenance and operation of vehicular bridges and tunnels within the said Port of New York District * * * are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the Port Authority shall be regarded as performing an essential governmental function in undertaking the construction, maintenance and operation thereof and in carrying out the provisions of law relating thereto, and shall be required to pay no taxes or assessments upon any of the property acquired or used by it for such purposes."[1]

Of this same language in an earlier Port Authority statute, the Hon. Charles Evans Hughes, in his opinion of November 10, 1925, said: "This declaration is fully warranted by the nature of the functions of the port authority and of the purposes for which it has been established." His conclusion as to the necessity for the creation of the Port Authority was that

> "Its creation was due to the need of the co-operation of the two States in the development and co-ordination of the terminal, transportation and other facilities of commerce in the territory in and around the port of New York."

In *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, the Court, after reviewing the necessity for the ownership of the

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[1] This determination by the State Legislatures proceeded from a factual investigation by a joint State Legislative Commission (Stip. Ex. B). "Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility." This Court merely examines "the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." *South Carolina State Highway Department* v. *Barnwell Bros.,* 82 Law. Ed. Adv. Ops. 469, 477.

Panama Rail Road Company by the Government in connection with the Canal, concluded that the public health, the making of sanitary rules and regulations, the national defense and the regulation of commerce, all required such governmental ownership. Every single one of these factors is paralleled in the public necessity which led to the creation of the Port Authority. (See Stip. Ex. B, p. 35). The Court found that the public necessity for the construction of the Canal and the acquisition of the Panama Rail Road included the regulation of commerce. The Court included bridges and highways in this finding as to the governmental character of waterways, saying (p. 406):

> "*The building and operation of a bridge or a road or a canal* is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation." (Italics ours.)

The inclusion of such a purpose within the necessity for the creation of the Port Authority, was announced by the States in the Port Compact (Stip. Ex. E, p. 13):

> "* * * It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the States of New York and New Jersey."

The impossibility of coordinating conflicting port interests and effectuating a comprehensive plan of port development save through the offices of a governmental agency, is evident from the record here (R. f. 398). It was this very inability of private enterprise, or even of the two States acting separately, to achieve adequate development of the port, which led to the dangers pointed out in the *New York Harbor Case*, 47 I. C. C. 643. When the two States entered into their Port

Compact, they declared, after a recital of its purpose, that (Stip. Ex. E, p. 13):

> "* * * Such result can best be accomplished through the cooperation of the two states by and through a joint or common agency."

This determination was clearly within the province of the two States.

> "* * * if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions" *Brush* v. *Commissioner,* 300 U. S. 352, 371.

In the final analysis, the action of the States in creating the Port Authority was the result of the conviction of the Governors and Legislatures of the two States that the problem was so intimately bound up with the public welfare as to make unthinkable any solution by other than a direct instrumentality of the two States.

POINT III.

The Port Authority is the governmental instrumentality of the States of New York and New Jersey.

We have stated as the second of the three principal inquiries (*supra,* p. 57) made in the *Rogers* and *Brush* cases, in determining whether an agency is performing governmental functions:

Is the agency selected truly an instrumentality of government?

Most recently in *James* v. *Dravo Contracting Co.,* 82 Law. Ed. Adv. Ops., 125, 138, the Court said "that the nature of

the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption." The court pointed out that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the government "that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power." The Court said that "it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function,' was prohibited."

The status of the Port Authority as just such a governmental instrumentality becomes clear from a consideration of its very nature and attributes and from the control which the States exercise over it.

Inquiry into the governmental character of the Port Authority is answered by the declarations of the two Legislatures and of the Congress, that the Port Authority is "the joint or common agency" of the two States, "a body corporate and politic" and the "municipal corporate instrumentality" of the States (Stip. Ex. E, pp. 13, 43).

Congress itself has recognized the governmental character of such municipal corporate instrumentalities.[1] The

[1] The securities of agencies of just this type are expressly exempted from the provisions of the Securities Act (15 U. S. C. A., Sec. 77[c], par. 2), and of the Securities and Exchange Act (15 U. S. C. A., Sec. 78(c) [12]). The Public Works Administrator made the same determination under 40 U. S. C. A. Sec. 403(a)(2). On November 21, 1934 the Comptroller of the Currency ruled that national banks might purchase Port Authority securities under the statutory language "general obligations of any state or of any political subdivision thereof."

state courts have repeatedly found that port authorities, by reason of their very nature and powers, are municipal corporations and governmental instrumentalities. *Rosenkranz* v. *City of Evansville,* 194 Ind. 499, 143 N. E. 593; *State* v. *Port of Astoria,* 79 Ore. 1, 154 Pac. 399; *Stevenson* v. *Port of Portland,* 82 Ore. 576, 162 Pac. 509. In *Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 518, the Court said of the action of the two States in creating the Port Authority:

> "They joined in an agreement for the creation of a *governmental agency* * * *" (Italics ours).

The powers, privileges and immunities of the Port Authority are those of an instrumentality of government completely integrated into the governmental systems of the two States. It is unnecessary here to detail these powers and immunities. They are all stipulated (Stip. R. f. 284, 285; R. f. 322-332) and are found as facts by the Board below (Findings, R. f. 67-69). They are set forth in detail in the brief submitted by New York, New Jersey and other States as *Amici Curiae* (See Point III of that brief).

At the outset of Point I of the brief submitted on behalf of the Commissioner, it is argued that the separate corporate entity of the Port Authority is of significance in this case. We would have thought that any significance which might ever have attached to such a contention was disposed of by *McCulloch* v. *Maryland,* 4 Wheat. 316; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401; and *Brush* v. *Commissioner,* 300 U. S. 352. In each of those cases the agency involved was a separate corporate entity—the Bank of the United States, the Panama Rail Road Company, and the City of New York. The activities of each were held to be normal governmental functions. In pursuing this argument, the Commissioner says that the revenues of the Port Authority

"belong to it alone" (Brief, p. 31). On the contrary, all Port Authority revenues are held subject to the absolute direction of the two States[1] (Stip. Ex. K; Laws of New York, 1931, Chap. 48; Laws of New Jersey, 1931, Chap. 5). The Commissioner says also that the Port Authority's "operations are subject to no control by the executive branch of either State" (Brief, p. 32). On the contrary, it is stipulated that the Governor of each State has a veto power over the acts of each Commissioner from his State (Stip. R. f. 323). The minutes of each meeting of the Port Authority are submitted to the Governor of each State for his approval. The Commissioners are appointed by the Governors, with the advice and consent of the respective States' Senates, and are removable, in the case of New Jersey by the State Senate, and in the case of New York by the Governor (Stip. R. f. 323).

The States chose the Port Authority as the more efficient alternative to their own performance of their sovereign functions in the development of the Port. They were thus able to achieve the substitution of an economic for a political boundary line, to avoid the problem of dual sovereignty, the huge increase in the state debt, and to establish a permanent body not affected by political changes which so often obstruct long range planning. In the words of Mr. Justice Holmes, "The incorporation and formal erection of a new personality was only for the convenience of the United States, to carry out its ends". *Clallam* v. *United States*, 263 U. S. 341, 345.

As Governor Lehman of New York said in his Annual Message to the Legislature, January 1, 1936:

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[1] Of course, the pledge of revenues to the payment of bonds and interest is a direction of the States. Sec. 11, Chap. 4, Laws of New Jersey, 1931; Sec. 11, Chap. 47, Laws of New York, 1931.

"In certain instances an authority may well be a sound and reasonable method by which to reach a desired end. Equally true, an authority such as the Port of New York Authority may be the only suitable agency."

The Commissioner suggests (Brief, p. 19) that in the event of liquidation or dissolution of the Port Authority, there is no statutory provision "for the reversion of its properties and facilities to either or both of the two States". Aside from the fact that title to the Holland Tunnel is held directly by the two States, it is obvious that such ownership as the Port Authority has, is strictly limited by its legal position as the agent and trustee for the two States.[1] The States could, at any time, by joint action dissolve the Port Authority and take over the properties directly. "There is no stock and are no stockholders, the Port Authority not being owned or controlled by any private persons or corporations" (Stip. R. f. 342, 343). Such dissolution would revest both States directly with all the assets which the States now have indirectly in the name of the Port Authority. The old Holland Tunnel Commission was just such a joint agency of the two States. Upon its dissolution the control, operation and management of its properties was disposed of in accordance with the directions of the two States (Chap. 47, Laws of New York, 1931; Chap. 4, Laws of New Jersey, 1931).

Both State and Federal Courts have repeatedly found the Port Authority to be the agent of the States. The utterances of the Circuit Court in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515 have already been referred to. The Circuit Court

[1] We note the legal development of this principle of fiduciary relationship in the field of public law. *Williamsburgh Savings Bank* v. *State*, 243 N. Y. 231. There the Court of Appeals upheld the State's moral obligation to repay the bonds of such agencies in case of default.

for the Third Circuit in *City of Newark* v. *Central R. R. Co. of N. J.*, 297 Fed. 77, similarly referred to the Port Authority as a governmental body. The Board of Tax Appeals so found not only in the instant cases, but also in *Moisseiff* v. *Commissioner*, 21 B. T. A. 515, and *Carey* v. *Commissioner*, 31 B. T. A. 839. The New Jersey Court of Chancery so held in *New Jersey Interstate Bridge & Tunnel Commission* v. *Jersey City*, 93 N. J. Eq. 550, and *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221. The New York Court of Appeals so referred to the Port Authority in *Gaynor* v. *Marohn*, 268 N. Y. 417; and the New York Supreme Court so held in *The Port of New York Authority* v. *Lattin*, N. Y. Law Journal, Dec. 3, 1930; *Boyle Holding Corp.* v. *Medgreen*, 154 N. Y. Misc. 189, and *Bush Terminal Co.* v. *City of New York*, 152 N. Y. Misc. 144.

Most recently the Supreme Court of the State of New York held the Port Authority to be immune from suit on the ground that "it was created by treaty between the States of New York and New Jersey and is thus clothed with sovereign immunity." *Pink* v. *The Port of New York Authority*, N. Y. Law Journal, Feb. 3, 1938, page 567. Even as this brief is written, the New York Court of Appeals in *Buffalo and Fort Erie Public Bridge Authority* v. *Davis*, decided March 8, 1938, again referred to its classification of the Port Authority and other Authorities as state agencies. The same view has always been held by the Attorneys General of both the State of New York[1] and the State of New Jersey.[2] It is the con-

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[1] Attorney General Newton, opinion of May 12, 1921; Attorney General Bennett, opinions of February 25, 1931, March 10, 1932 and February 8, 1934.

[2] Attorney General Katzenbach, opinion of March 5, 1925, to the Governor of New Jersey.

clusion reached by the United States Government itself, through its Comptroller of Currency[1] and its Public Works Administration.[2]

The second line of inquiry pursued in the *Rogers* and *Brush* cases—"Is the agency selected truly an instrumentality of government?"—must therefore be answered in the affirmative.

POINT IV.

Governments have universally exercised the function of developing their ports, bridges and highways as a traditional governmental duty.

The third and final inquiry (see *supra*, p. 57) suggested by the opinions of this Court in the *Rogers* and *Brush* cases is:

> *Have governments traditionally and universally exercised the function?*

Thus, in the *Brush* case, the Court made a factual examination into the extent of the exercise of governmental power in dealing with the distribution of water, both for purposes of irrigation (300 U. S. 352, 366, 367), and in the protection, ownership and distribution of domestic water supply in urban centers (pp. 368-370). And in the *Rogers* case, the

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[1] The Treasury Department, in a letter of April 4, 1934, from the Comptroller of the Currency to Messrs. Shearman and Sterling of New York City, declares that the Port Authority "is a body corporate and politic created between the States of New York and New Jersey and is a municipal corporate instrumentality of the two States."

[2] Stip. R. f. 313.

Court considered "the contemporaneous and long-continued administrative practice" that had established the Panama Rail Road Company as a governmental auxiliary of the Canal (299 U. S. 401, 406). The same inquiry is suggested in *Helvering* v. *Therrell,* 82 Law. Ed. Adv. Ops. 537.

Addressing this inquiry to the activities of the Port Authority, we submit that governments have traditionally exercised the function of developing their ports, harbors, highways, bridges and tunnels. These are functions which governments, and particularly our state governments, have always discharged as sovereign duties.

> "Cities have long exercised the power: to acquire, construct, maintain, control, supervise and regulate docks, wharves, and harbor facilities, including the making of river and harbor improvements in connection therewith; to own and operate ferries; to lay out and improve roads and highways; and to construct and maintain canals, bridges and other works of internal improvement of a public character." *Dysart* v. *City of St. Louis,* 11 S. W. (2nd) 1045, 1049 (Sup. Ct., Mo.).

These are "duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution". *Helvering* v. *Therrell,* 82 Law. Ed. Adv. Ops. 537, 540. National defense, the flow of commerce, and the health, welfare and prosperity of the people are among the basic concerns which have made such governmental control essential. The Commissioner cannot but recognize this. He says (Brief, pp. 62, 63):

> "We readily agree that the Port Authority is performing services of great benefit both to the states and to the

nation. We readily agree that its activities, in building bridges and in developing the port, are appropriate fields for state action *sanctioned by long usage.*" (Italics ours.)

1. Port and Harbor Development.

This Court has indicated that the development of ports and harbors is one of the high governmental duties of the states. *Illinois Central R. R. Co.* v. *Illinois,* 146 U. S. 387, 452. See also *Williams* v. *Mayor,* 105 N. Y. 419, 436; *Ferguson* v. *Ross,* 126 N. Y. 459; *Matter of Mayor of the City of New York,* 135 N. Y. 253, 262.

From the earliest times these "gates of the realm" have been under governmental control. Under the common law, the ownership of the soil under all navigable waters was vested in the sovereign as *parens patriae* for the benefit of all his subjects. Thus, the people at large were entitled to the free use of the sea and all navigable waters for navigation, fishing and commerce, subject to the regulation and control of the government. *Appleby* v. *New York,* 271 U. S. 364, 382; *Lansing* v. *Smith,* 4 Wend. (N. Y.) 9. In the civil law, under the jurisprudence of Justinian: "Also all rivers and ports are public." Institutes, 2, t. 1, s. 1.

In the Seventeenth Century, Lord Hale, in his treatise "A Narrative Legall and Historicall Touchinge The Customes" under "Caput Primum—Concerninge The Ports, Theyr Natures and Originalls," wrote:

"So that in truth as a city or borough or colledge denote an artificiall aggregate nature or franchis, so doth a port denote a place not only where shipps naturally may but civilly and legally may come and unlade and relade." (See Stuart A. Moore's History of The

Foreshore and The Law Relating Thereto (1888) p. 320.)

Holdsworth, in his "History of English Law" (Volume 2, p. 467), tells us that in the early days of England,

> "Good roads were almost non-existent, and therefore the maintenance of a free passage by river was a matter of the first importance. From Magna Carta onwards, numerous statutes provided for the removal of weirs and other obstacles to navigation. 25 Edward III. St. 3 c. 4; 45 Edward III. c. 2; 1 Henry IV. c. 12; 4 Henry IV. c. 11; 9 Henry VI. c. 9; 12 Edward IV. c. 7."

The control of the Thames, along with all other waterways in the kingdom, was in early times vested in the Crown. In the early part of the Twelfth Century, however, the King's jurisdiction was shared in some measure by the Corporation of the City of London. Typically enough, in the light of English history, the municipal corporation gradually attained full jurisdiction of the Port of London. This development is set forth in "The Port of London Yesterday and Today" (1927), by D. J. Owen, at page 16, which continues:

> "The Charter of King James I stated that the Mayor, commonalty and citizens of London time out of mind had exercised the office of bailiff and conservators of the water of the Thames. The third Charter (1615) contains the true and weighty words, 'It is notoriously known that the river of Thames is so necessary, commodious and practicable to the said City of London and without the said river our City would not long subsist, flourish and continue.' The functions of the Corporation in course of time extended to include, amongst other things, the regulation of shipping, the fixing of mooring posts in the river, the direction of the methods of removing ballast, the repairing of the banks, the levying of rents for projections into the stream, the licensing of wharves, jetties and landing places, and the periodical official inspection of the river."

Both in Scotland and in England the right to erect a port was part of the royal prerogative. No port could exist except under the authority of the sovereign.[1] Blackstone says:

> "By the feodal law all navigable rivers and havens were computed among the regalia, and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore, and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm;" Blackstone, Commentaries on the Laws of England, edited by William Draper Lewis (1898). Book 1, page 264.

Control of customs was by no means the only reason for the exercise of the King's prerogative with respect to the designation and control of the facilities of the port. It was recognized that foreign trade and commerce would not be carried on and stimulated if left wholly to the control of private individuals who would naturally seek to create monopolies in the use of wharves and other facilities. Certain quays and other terminal facilities were always declared by the Crown to be open for use by the general public at reasonable charges, and in many cases these facilities were constructed and operated by the Crown itself.

In *Shively* v. *Bowlby,* 152 U. S. 1, this Court reviewed the common law history of rights in navigable waters and showed clearly that not only the waters themselves, but wharves and other landing places were regarded as parts of the public water highway over which the Crown exercised

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[1] *Hunter* v. *Northern Mar. Ins. Co.,* L. R. 13 A. C. 717; *Sailing Ship "Garston" Co.* v. *Hickie & Co.,* L. R. 15 Q. B. D. 580; *Mayor of Yarmouth* v. *Eaton,* 3 Burr. 1402; *Jenkins* v. *Harvey,* 1 C. M. & R. 877; *Lord Falmouth* v. *George,* 5 Bing. 286; *Attorney General* v. *Richards,* 2 Anst. R. 603; *Foreman* v. *Free Fishers of Whitstable,* L. R. 4 H. L. 266; *Case of London Wharfs,* 1 Sir W. Blackst. 581; *Hale, De Portibus Maris; Gould on Waters,* 3rd Ed., pages 11, 12.

jurisdiction for the benefit of the people as a whole. See also *Kerr* v. *W. S. R. R. Co.*, 127 N. Y. 269.

In concluding that the ownership, control and operation of Port facilities are essential and usual prerogatives of sovereignty, especially of the sovereignty of the constituent state governments of the United States, the Circuit Court of Appeals in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 517, said:

> "Port and harbor developments have long been regarded as governmental functions in providing for the welfare and prosperity of the people. * * * Historically, port activities have been shown to be almost universally directly subject to the supervision of agencies of government."

Public governmental wharves or piers existed not only in the early days in England but also in the American Colonies. The history of New York is but typical. Thus, in 1676, we find the City of New York imposed a tax for the construction of new docks.[1] In 1686 the New York Colonial Legislature authorized both New York and Albany to construct and repair water-courses, streets and highways.[2] In 1691 the Mayor, Aldermen and Council of New York were given the power to appoint supervisors of wharfs, docks, streets and lanes.[3] Again, in 1734 the Colonial Legislature directed the construction of a public wharf in Albany.[4] Such governmental port projects are referred to in the argument of counsel in *Gibbons* v. *Ogden*, 9 Wheat. 1, 73, 74 (1824):

> "The right of a state to regulate its internal trade, applies as well to its navigable waters as to its other territory. * * * It grants the land under water at pleas-

[1] Minutes of the Common Council, Vol. I, p. 10.
[2] Colonial Laws of New York, 1686, I, pp. 183, 198.
[3] Chapter 18, Colonial Laws of New York, 1691.
[4] Chapter 620, Colonial Laws of New York, 1734.

ure, *builds public piers,* erects dams and other obstructions, and diverts the course of the waters for any purpose whatsoever." (Italics ours.)

In 1877 the New York Court of Appeals reviewed the governmental operation of the Port's facilities and forcefully urged upon the State its *governmental duty* to go forward with the development and future planning of the Port of New York. In *Williams* v. *The Mayor,* 105 N. Y. 419, 436, the Court said:

> "The State owned but a single seaport open to commerce and touched by tide water, and that one a harbor of remarkable size and convenience. Its interest to concentrate there ships and cargoes from all parts of the world, by protecting the harbor and lining it with docks and piers, was very great, *and took on the character of a duty due to the prosperity of the commonwealth. It early imposed that duty upon the city and the citizens by whom it has been steadily performed, at very great cost, and one in the future to be largely increased. Every grant the State made was in aid of the expenditure involved in the performance by the city of that duty, and in consideration of that performance. Little enough of its own duty has been borne by the State, and to call that little a pure gratuity amounts almost to a sarcasm."* (Italics ours.)

In *Matter of Mayor of the City of New York,* 135 N. Y. 253, 262, 263, the Court of Appeals again urged the development of the Port of New York as a public duty owing by the State. It is interesting to note in passing that this case, decided in 1892, reviews the efforts made by the State up to that time in the development of the Port, and refers to the port reforms of 1871, as follows:

> "The state itself owed a duty to its own citizens to provide adequate means for the carrying on of the commerce which was sure to come to the one great seaport within its borders. That duty, * * * it early imposed upon the city and the citizens, by whom it has steadily

been performed at great cost. In 1871 the legislature changed entirely the general system by which this duty of building bulkheads, docks and piers had theretofore been performed.

"Instead of devolving upon private owners the duty of building such structures and giving to private individuals the right to collect wharfage, a general and vast system was provided for by the act of 1871 (Chap. 574). That system involved the adoption of a plan for the building of bulkheads and piers by the city itself along the whole water front washed by the two rivers, and the collection of wharfage by the city as compensation for their use."

The people of States were to wait fifty years before the accomplishment of the next great port reform—the creation, in 1921, of The Port of New York Authority.

The governmental duty of the states in the development of their ports and harbors was stressed also by the Supreme Court of California in *Board of Port Commissioners of the City of Oakland* v. *Williams,* 94 Cal. Dec. 195, 200 (1937):

"* * * it is the paramount duty of government to zealously guard the public interest, unhampered by private contracts which may hinder its control of or impair the full beneficial use of its harbor, ports, waterways and tidelands which are held in trust for the promotion and improvement of navigation and commerce."

Finally, the governmental nature of such waterway development by the states, as an established national policy, is attested by the declaration of Congress (33 U. S. C. A. § 551; 40 Stat. 1286) that,

"It is hereby declared to be the policy of the Congress that water terminals are essential at all cities and towns located upon harbors or navigable waterways and that at least one public terminal should exist, *constructed, owned, and regulated by the municipality or other public agency of the State and open to the use of all on equal terms.*" (Italics ours.)

This general declaration of policy, is in complete accord with Congressional reference to the Comprehensive Plan for the development of the Port of New York, that

> "* * * the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military and other services of value to the Nation," (Pub. Res. No. 66-67th Cong.)[1]

The Legislatures of the two States have declared that the activities of the Port Authority

> "are and will be in all respects for the benefit of the people of the States of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and *the Port Authority shall be regarded as performing an essential governmental function* in undertaking the construction, maintenance and operation thereof * * *" (Chap. 4, Laws of New Jersey, 1931, Sec. 14; Chap. 47, Laws of New York, 1931, Sec. 14.) [Italics ours].

The brief submitted here by the American Association of Port Authorities, *amicus curiae,* contains a survey of governmental activity in port development throughout the world, and shows that the nature of port development is such that it can be accomplished only through such action.

2. Bridges, Tunnels and Highways.

It is a settled principle of law as well as an obvious statement of fact, that public bridges are a part of the highway

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[1] Of the foregoing congressional declaration of the Supreme Court of New York in *Bush Terminal Co. v. City of New York,* 152 N. Y. Misc. 144, 151, has said:

> "This indicates clearly that Congress regarded the solution of the port problem as an exercise by the States of an essential function of government."

which passes over them. "At common law a bridge was a common highway," *Washer* v. *Bullitt Co.*, 110 U. S. 559, 564; *County Commissioners* v. *Chandler*, 96 U. S. 205, 208; *Pain* v. *Patrick*, 3 Mod. 289, 294 (1690); Woolrych, "A Treatise on the Law of Ways" (1834 Ed.), pp. 5, 195.[1] Historically, they have always been treated as such.[2] And, of course, tunnels are merely the more modern way of "bridging" waters to afford a passage for public highways. Accordingly, all of the Port Authority's interstate crossings are treated by the two States as a part of their highway systems, and they have been found to be such by the Courts of each State.[3] In every case which has passed upon the immunity of State bridges from Federal taxation, they have also been treated as highway connections. See *Commissioner* v. *Harlan*, 80 F. (2d) 660, 661; *United States* v. *King County*, 281 Fed. 686, 688; *Jamestown & Newport Ferry Co.* v. *Commissioner*, 41 F. (2d) 920, 923; *Boomer* v. *Glenn*, 21 F. Supp. 766, 767. For the purpose of this discussion, we shall therefore treat bridge, tunnel and highway construction as a single subject.

Turning to the history of the governmental development of bridges and highways, we find, in the recent language of a Federal Court, that

> "The construction and maintenance of highways and bridges as a governmental function is one of the most

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[1] See also 9 Corpus Juris 422, footnote 12, and cases there cited.

[2] See Public Works in Mediaeval Law—Edited by F. T. Fowler, for the Seldon Society, 1923 Introduction, page xxv.

[3] Chapter 50, Laws of New Jersey, 1918; Chapter 352, Laws of New Jersey, 1920; Section 1, Chapter 47, Laws of New York, 1931; Section 1, Chapter 4, Laws of New Jersey, 1931; Chapter 599, Laws of New York, 1932; Chapter 113, Laws of New Jersey, 1932; *Clarke* v. *Ackerman*, 154 N. Y. Misc. 267, 243 App. Div. 446; *New Jersey Interstate Bridge and Tunnel Commission* v. *Jersey City*, 93 N. J. Eq. 550, 551, 553; *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221, 229.

ancient known to the law, having had its beginning prior to the civil or common law." *Boomer* v. *Glenn,* 21 F. Supp. 766, 767.

Herodotus points out that as early as 4000 B. C. the Pharaoh Menes, the founder of the First Dynasty, had a bridge constructed over a branch of the Nile.[1] And there is evidence of a tunnel constructed over four thousand years ago, about 2180 B. C., under the Euphrates River. This tunnel has been attributed to Queen Semiramis of Assyria, but we have no convincing proof of its construction as a governmental project.[2]

However, when we turn to the Greeks and the Romans, the record is clear. The Kings of Sparta were especially charged to see to the good condition of the roads.[3] The place of the Romans as the great bridge and highway builders of antiquity is almost too well known to require comment. As is pointed out in *Boomer* v. *Glenn, supra,* at 767, "The Romans celebrated every victory by building a highway or bridge." And the character of bridge building as a function of government among the Romans is nicely illustrated in the title "Pontifex Maximus" borne by high governmental officials throughout the history of the Republic and attached by the Emperors to their imperial dignity.[4] The function of that

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[1] "Bridges—Old and New"—Franklin Institute Journal, Volume 194, pages 291, 292 (1922).

[2] "The Story of Tunnels," by Archibald Black, page 4.

[3] Nicholas Bergier, 'Histoire des Grands Chemins de L'Empire Romain" (1728), Chapitre 11, Book I, page 3, "De La Dignité de ceux que ont esté commes aux ouvrage des Grand Chemins."

[4] Jacob Leupold, Theatrum Pontificiale (1726), pages 1, 2 (available, Library Engineering Society, New York City).

For an enumeration of public bridges built by the Republic and the Emperors of Rome, see "Bridges—Old and New" by Ralph Modjeski, Franklin Institute Journal, Volume 194, page 291 (1922).

office, before it had acquired its exclusive religious significance, is manifested in that title itself—Principal Bridge Builder.[1]

In the common law of England, the recognition of bridges and highways as peculiarly within the concern and responsibility of the government, appears clearly from all authorities. In *Butler* v. *Perry,* 240 U. S. 328, 330, this Court itself reviewed the early English law, as reported by Blackstone. Mr. Justice McReynolds said:

> "In view of ancient usage and the unanimity of judicial opinion, it must be taken as settled that, unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public. The law of England is thus declared in Blackstone's Commentaries, bk. 1, page 357:
>
> 'Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas,* to which every man's estate was subject; *viz, expeditio contra hostem, arcium constructio, et pontium reparatio.* For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, with respect to the construction and repairing of ways and bridges no class of men of whatever rank or dignity should be exempted.'

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[1] "The supervision of roads and bridges was held so honorable a duty among the Romans that their highest religious official was styled 'Pontifex Maximus' (i.e. 'head bridge builder'), whence the title of 'Pontiff,' still worn by the Pope." *State* v. *Covington,* 125 N. C. 641, 644, 34 S. E. 272.

> The *trinoda necessitas* was an obligation falling on all freemen, or at least on all free householders. Vinogradoff, English Society in the Eleventh Century, p. 82."

The construction of bridges as one of the three great services for which every man might be conscripted, and to which his estate was subject, is emphasized also by Holdsworth, "History of English Law", Volume 1, p. 19:

> "It is true that in these grants of governmental rights certain duties like military service and the repair of bridges and fortresses, which are usually compendiously described by the phrase *trinoda necessitas*, were always implicitly and sometimes expressly reserved."[1]

The story of each one of the famous English bridges over the Thames, from the bridge built by Peter Colechurch around 1200, reveals a continuous practice of governmental construction, financing and maintenance.[2]

Turning to our own country, we avail ourselves of the language of McQuillan, Municipal Corporations 2nd Ed. (1928) Volume 1, Section 246, page 631:

> "During the early periods of English history the highways were laid out and constructed directly by the government. The government assumed the immediate and sole management of them, and this was recognized as an essential governmental function. In this country the control of highways is primarily a state duty."

The construction and operation of the Cumberland Road by the Federal Government, conceived by Washington

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[1] See also Public Works in Mediaeval Law—Edited by F. T. Fowler for the Selden Society, Introduction, pages xxv and xxvi.

[2] *Gephyralogia—An Historical Account of Bridges—Antient and Modern* (1751); *The Development of Bridge Construction*, by Philip G. Laurson, Volume 21, Journal of Engineering Education, pages 433, 438 (1931).

in 1780 and financed by Congress in 1802, and the eventual turning over of this facility by the Federal Government to the States for operation as a toll road, illustrates the traditional governmental importance of highways in this country, both to the Federal Government and to the States. See *Searight* v. *Stokes,* 3 How. 151, 163-166; *Indiana* v. *United States,* 148 U. S. 148.

The high governmental character of the construction and maintenance of highways by the states was pointed out by this Court, after reviewing the common law authorities as quoted above, in *Butler* v. *Perry,* 240 U. S. 328, 331. Turning to the situation in America, this Court said:

> "From Colonial days to the present time conscripted labor has been much relied on for the construction and maintenance of roads. The system was introduced from England, and, while it has produced no Appian Way, appropriateness to the circumstances existing in rural communities gave it general favor. (Citing authorities) In 1889 the statutes of twenty-seven states provided for such labor on public roads."

The complete adoption by the American states of the common law duties and responsibilities of bridge and highway construction and repair is evident from the decision of the New Jersey Supreme Court in *Freeholders of Sussex* v. *Strader,* 18 N. J. L. 108, 111, in the following language:

> "The repair of bridges (reparatio pontium, anciently a part of the trinoda necessitas,) is one of the most important of those objects, not only at common law, but as recognized by our statutes. 1 *Black,* C. 376; 2 *Wm. Black,* 685; 2 *East,* 342, 356; 2 *Maul, and S.* 513; *Ryan. & M.* 144; 1 *Barn and A.* 289; 13 Rep. 33; N. J. *Rev.* L. 285. It has ever been held in England, that the statute of 22 *Henry 8th ch.* 5, which places the burthen of

repairing bridges, (except in special cases,) upon the county, was merely declaratory of the common law. 13 Co. 37, *sec.* 7; 2 *Inst.* 701."[1]

In New York the construction of roads was performed by state or municipal agencies from the inception of organized government. Thus, in the records of a Long Island town, we find this entry with respect to highway supervision, under date of March 14, 1659:

> "It is ordered that John Smith nants Rich'd Willets Ambros Sutton and John Smith Junior shalbe Surveyors of the High wayes for this present yeare, And shall perform ye duty of surveyors and that any person that shall refuse to come to doe ye Labour belonging to them shall pay for A man 4s, and for a man & his teeme 8s, And ye surveyors by default of performing their duty shall pay for each default 40s ster." Records of the Towns of North and South Hempstead, Long Island, New York, I, 74.

The very first session of the New York Colonial Assembly provided for the selection of highway supervisors.[2] Numerous special highway authorizations in the Colonial Assembly followed.[3] The Road District as a governmental unit existed

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[1] See also *State* v. *Covington*, 125 N. C. 641, 644, 34 S. E. 272; *State* v. *Holloman*, 139 N. C. 642, 647; 52 S. E. 408.

[2] Colonial Laws, 1691, Chap. 3, p. 226.

[3] In 1739 Suffolk county was permitted to elect town highway commissioners (ibid., c. 686). Kings, Queens, Richmond, and Oswego counties were empowered by an act of 1745 to elect three freeholders in each town to lay out highways (ibid., c. 805). In 1756 town commissioners were named by the council and general assembly in Ulster county (ibid., c. 1001). Two precincts in Orange county were authorized to elect three surveyors of highways and to levy a three shillings tax in 1760 (ibid., c. 1144), and Richmond county was authorized to select two freeholders in each precinct to be highway overseers (ibid., 1764, c. 1267).

in New York as early as 1797 (Chap. 43, Laws of New York, 1797). In 1790 contracts were let for the building of a road between the Susquehanna and Hudson Rivers (Chap. 53, Laws of New York, 1790). Two years later, the State was divided into four highway districts, and $20,000 was placed at their disposal for the opening of highways and the construction of bridges (Chap. 60, Laws of New York, 1792). In 1788, the same year in which New York ratified the Federal Constitution, the New York State Legislature authorized and empowered each town in the State to choose three highway commissioners to supervise the local highways (Chap. 64, Laws of New York, 1788). These highway activities of the State during the first years of the republic, suggest the very recent language of this Court (*Helvering* v. *Therrell,* 82 Law. Ed. Adv. Ops. 537, 540), that the governmental duties which the Court holds immune include "those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution."

The Federal Courts have always regarded the highway systems of this country as not only a usual and customary sphere of state activity, but as one of the most essential of their governmental duties. This Court said in *Atkin* v. *Kansas,* 191 U. S. 207, 221, 222:

> "The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for, *it is one of the functions of government to provide public highways* for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with the power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character." (Italics ours.)

And most recently in *South Carolina State Highway Department* v. *Barnwell Bros.*, 82 Law. Ed. Adv. Ops. 469, 474, the Court said:

> "Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. * * * local highways are built, owned and maintained by the state or its municipal subdivisions."

Facing the force of the historical argument, the Commissioner (Brief, p. 40) attempts to escape it by reference to examples of the private operation of bridges. We know of no private analogue for the development of American ports and highways. It is quite true, of course, that there are a few bridges operated by private interests, but it is clear that in this country they are few and far between. There has never been a private development of a vast network of interstate crossings, with connecting arterial highways, linking the road systems of two states, as a part of a comprehensive plan of port development. Furthermore, we know of no governmental function, from the operation of the post office to the maintenance of schools and the raising of armies, that has not been, or is not today, the subject, to some extent, of private operation (See *Brush* v. *Commissioner*, 300 U. S. 352). Unlike the supply of water, the development of ports and highways has never been "left largely, or even entirely, to private enterprise". Their governmental operation has not "had a recent beginning" (*Brush* v. *Commissioner*, 300 U. S. 352, 371). They have always been functions of government.

The organization of commissions, districts, authorities and other types of state agencies for the construction and maintenance of bridges and tunnels for operation of these facilities on a self-liquidating basis has been recognized as a func-

tion of government by the highest courts of many of the States. *In re California Toll Bridge Authority,* 212 Cal. 298; 298 Pac. 485; *California Toll Bridge Authority* v. *Kelly,* 218 Cal. 7; 21 Pac. (2d) 425; *Bates* v. *State Bridge Commission,* 109 W. Va. 186; 153 S. E. 305; *Alabama State Bridge Commission* v. *Smith,* 217 Ala. 311; 116 So. 695; *Estes* v. *State Highway Commission,* 235 Ky. 86; 29 S. W. (2d) 583; *Bloxton* v. *State Highway Commission,* 225 Ky. 324; *Tranter* v. *Allegheny County Authority,* 316 Pa. 65; 173 Atl. 289; *Buffalo and Fort Erie Public Bridge Authority* v. *Davis,* N. Y. Ct. of Appeals, decided March 8, 1938.

The fact that a toll is charged for the use of a bridge or tunnel does not affect its character as a public highway. *County Commissioners* v. *Chandler,* 96 U. S. 205, 208; *Brush* v. *Commissioner,* 300 U. S. 352, 372.

Modern economic and social conditions require the furnishing of public highways, now more than ever before. When we turn to the practical consideration of whether or not the construction of highways is a usual governmental function, we find it to be the activity to which state governments have in recent years actually devoted the largest share of their revenues. The reports of the United States Department of Commerce, Bureau of Census, entitled "Financial Statistics of States" for the years 1929, 1930 and 1931 (the last years for which complete figures are available), indicate that the largest items of state expenditures for capital outlay and maintenance were as follows:

1929

Total Expenditures	$1,992,705,957
Highways	*752,171,713*
Education	559,737,280
Charities, Hospitals and Correction	260,634,569
General Government	126,709,168

1930

Total Expenditures	$2,178,279,827
Highways	*886,514,579*
Education	598,058,080
Charities, Hospitals and Correction	276,896,277
General Government	124,866,796

1931

Total Expenditures	$2,389,125,642
Highways	*997,707,823*
Education	629,687,870
Charities, Hospitals and Correction	232,282,612
General Government	147,525,127

We therefore conclude, after consideration of the three lines of inquiry suggested in these Points II, III and IV, that *even were there no controlling precedents* on the immunity of the Port Authority from taxation, immunity would nevertheless be evident from the foregoing pragmatic inquiry into the Port Authority and the nature of its functions. Those three questions—the public necessity, the governmental character of the agency, and the extent of governmental exercise of the function—are suggested by analysis of the method used by this Court in its most recent decisions in this field. Applied to the present cases, they leave no other conclusion than that The Port of New York Authority is a governmental instrumentality of the States of New York and New Jersey, exercising essential, usual, and traditional governmental functions.

POINT V.

The Port Authority is the agency of the States alone.

We have shown (*supra*, Point III) the close governmental interrelation between the two States and their instrumentality, the Port Authority. This close interrelation has been pointed out in the brief submitted by the Attorneys General of New York and New Jersey and other states. Despite all these evidences of integration and control, the Commissioner contends (Brief, Point II) that Congressional consent to the Compact destroys the character of the Port Authority as the governmental instrumentality of the States, and transmutes what were theretofore state functions into taxable federal functions. In this startling view the Port Authority "exists subject to the caprice of the Federal Government" (Commissioner's Brief, Circuit Court, p. 44), and the entire compact has the status of an Act of Congress! (Brief, p. 53).

The theory upon which the Commissioner offers this contention (and also his contention discussed hereinafter in Point VI) was considered and rejected by the Second and Ninth Circuits in *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515 and *Commissioner* v. *Harlan*, 80 F. (2d) 660, 662.

Their answer to the contention, as well as that of the Courts below, is best expressed in the opinion of the Board of Tax Appeals in the following language (R. f. 75):

> "* * * there is no reason to regard the revenue act as a means used by Congress * * * as an implied condition of its consent to the interstate compact. * * * It would mean that in making an interstate compact the states would be surrendering the very sovereignty which the Constitution takes for granted and upon which the compact is founded—and this, not directly by an express

> condition in the resolution of consent, but by an implied relation between the general terms of the consent and the broad terms of the revenue act. Is it to be supposed that in the blanket consent to interstate compacts for crime prevention * * * lurks a power to tax the state police officers who are employed under the compact?"

Indeed, the New York Supreme Court has interpreted the Congressional consent to the Port Compact as a *recognition* by Congress of the development of the Port, as a function of *state* government. *Bush Terminal Co.* v. *City of New York*, 152 N. Y. Misc. 144, 151.

The Commissioner refers, in support of his theory, to the memorandum recently filed by the Attorney General of the United States in *Hinderlider* v. *La Plata River and Cherry Creek Ditch Company*, No. 437, Present Term, and again cites the cases relied on in that memorandum. The Port Authority joined with several States in the submission of a memorandum (dated January 17, 1938) controverting the soundness of the Attorney General's memorandum. Upon the submission of the latter memorandum the Attorney General elected not to press the position previously taken by him.[1] He has submitted no answer to the arguments made in the States' memorandum.

No useful purpose would be served by restating the arguments offered in that memorandum of the Port Authority and the States submitted in the *Hinderlider* case. We respectfully refer the Court to pages 11 to 30 thereof. We believe that memorandum establishes that a compact is an exercise of the legislative powers of the states and not an

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[1] See Attorney General's memorandum in that case dated February, 1938.

act of Congress (*People* v. *Central Railroad Company,* 79 U. S. 455; *Hamburg American Steamship Co.* v. *Grube,* 196 U. S. 407), and that the requirement of Congressional consent, far from being a grant of power to the contracting states, is rather a protection of the other states of the Union against destructive political combination. It has but the effect of removing a political barrier to the exercise of sovereign powers inherent in the states. Once that barrier is removed, *the action taken is the sovereign enactment of the states themselves. Rhode Island* v. *Massachusetts,* 12 Pet. 657, 725; *Poole* v. *Fleeger,* 11 Pet. 186, 209; *Virginia* v. *Tennessee,* 148 U. S. 503, 525; *Marlatt* v. *Silk,* 11 Pet. 1, 22.

The States' memorandum showed, too, that the consent of Congress is not necessary to the validity of every compact. *Virginia* v. *Tennessee, supra; Louisiana* v. *Texas,* 176 U. S. 1, 17; 2 Story, Commentaries on the Constitution (5th Ed. 1891), Sections 1402, 1403. Even if this contention of the Commissioner had any legal merit it would therefore be seriously undermined by the grave doubt whether the Port Compact of 1921 actually required congressional consent.

Moreover, the Compact and all of its supplemental legislation were based upon the conception that the States were to perform the task. The Federal Government was not asked to do anything pursuant to the Compact and the Comprehensive Plan.

The Commissioner summarizes his argument in the following language (Brief, p. 56):

> "Their compensation is derived from a corporation created by the joint legislation not only of the States of New York and New Jersey but also of the Congress of the United States. * * * Accordingly, the Port Authority cannot assert an independence of Congress,

which participated in its creation, and cannot claim a constitutional immunity from taxes imposed by Congress."

Has the Commissioner forgotten that the Panama Rail Road Company, held immune by this Court, was created solely by the State of New York? That Congress did not even participate in its creation? Does he not realize that as a New York corporation it must conform to numerous regulations imposed by the Laws of New York? That it has no independence of the State which created it? Yet, this Court has held that Company immune from State taxation in its present corporate form. Obviously, the Commissioner must abandon his argument on this point or deny the authority of the *Rogers* case. That case shows that the test of immunity does not measure the quantum of State or Federal participation in an agency's creations. If the agency, State or Federal, is engaged in the performance of governmental functions, it is immune.

The Commissioner's whole line of argument in Points II and III of his brief rests upon fundamental error in constitutional law. It ignores the dominant characteristic of American government, the very characteristic which necessarily gave rise to the immunity rule—the dual and *limited* sovereignty of *both* state and federal governments. The American form of government knows no such absolute sovereignty as the Commissioner would seem to hypothesize for his argument.

Clear thinking will recognize that these very *limitations* upon the sovereignty of our state and national governments gave rise to the doctrines established in *McCulloch* v. *Maryland* and *Collector* v. *Day*. The rule came into being for

the very reason that this Court was always dealing with *limited sovereignties.* From the days of Marshall it has carried the responsibility of making "adequate provision for preventing conflict between them." *Helvering* v. *Therrell,* 82 Law. Ed. Adv. Ops. 537, 540.

POINT VI.

Federal regulation of interstate commerce does not impair the immunity of the Port Authority.

Like the contention as to the effect of Congressional consent to a compact, the contention that Federal regulation of interstate commerce destroys the immunity of the Port Authority rests upon a series of fundamental errors. Running through all of these errors, however, is the basic misconception which presupposes that absolute sovereignty and freedom from regulation are indispensable to the application of the Constitutional immunity doctrine. The Commissioner fails to recognize that we are dealing with a nation of limited rather than absolute sovereignties.

Aside from its rejection by the lower Courts here, it is a contention that has been raised and disposed of in both the Second and Ninth Circuits—*Commissioner* v. *Ten Eyck,* 76 F. (2d) 515, 517, 518 and *Commissioner* v. *Harlan,* 80 F. (2d) 660, 662. In the *Harlan* case the same legal theory was argued by the Commissioner. The Court replied:

> "The petitioner further contends that * * * the state in the construction of the bridge was not acting in its sovereign capacity, because state control must be exclusive and supreme in order to afford a basis for the doctrine of immunity. The cases cited by petitioner do

not support his contention, nor is the position correct. The fact that the state may be limited by the federal government in carrying out its essential governmental functions does not change the nature of those functions."

The Board of Tax Appeals below replied to the contention as follows (R. f. 74-75):

"The argument is pressed that the immunity is lost when the activity of the state is one involving interstate commerce or navigation * * *. The argument is not new. It was considered and rejected in *Commissioner* v. *Harlan, supra,* and there is enough in the opinion and briefs in the *Ten Eyck* case to show that the Federal power over interstate commerce and navigation were not overlooked. But to deal with the issue squarely, we are of the opinion that the development of the port may not be interfered with by Federal tax even though the interstate and foreign commerce passing through the port and upon its highways, bridges, and tunnels is subject to Federal regulation, even though the navigable waters under its bridges and over its tunnels are under Federal control, * * *. To this may be added that there is no reason to regard the revenue act as a means used by Congress to regulate interstate commerce, to control navigation, * * *. Such a view, if accepted, might go so far, for example, as to subject the employees of a state highway department or public service commission to Federal tax under the present law."

The Commissioner's analogy between the Federal power to regulate, on the one hand, and the constitutional immunity of State instrumentalities from Federal taxation, on the other, was flatly rejected by this Court in *United States* v. *California,* 297 U. S. 175, 184, 185:

"*The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating.* That immunity is implied from the nature of our federal system and the relationship within it of state and national governments,

> and is equally a restriction on taxation by either of the instrumentalities of the other. * * * Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce." (Italics ours.)

In other words, the Federal government obviously has the power to regulate many State functions *that are nevertheless immune from Federal taxation.* It may regulate the state highways. *South Carolina State Highway Department* v. *Barnwell Bros.,* 82 Law. Ed. Adv. Ops. 469. It may regulate a state contract fixing intrastate railroad rates. *New York* v. *United States,* 257 U. S. 591. It may regulate State sanitary districts. *Sanitary District* v. *United States,* 266 U. S. 405. It may regulate activities of State educational institutions. *University of Illinois* v. *United States,* 289 U. S. 48. It may set aside the order of state public service commissions. *New York* v. *United States,* 257 U. S. 591.

If there is any merit in the Commissioner's contention, he must necessarily take the position that all of these state functions are taxable. Yet, although *Sanitary District of Chicago* v. *United States,* 266 U. S. 405 holds that the United States in the regulation of commerce may prevent the withdrawal of a water supply by a state, *Brush* v. *Commissioner,* 300 U. S. 352, holds that a state in securing its water supply is immune from taxation! *South Carolina State Highway Department* v. *Barnwell Bros.,* 82 Law. Ed. Adv. Ops. 469, says that the Federal government may regulate state highway operations, but *Brush* v. *Commissioner, supra,* at page 373, says that the operation of its highways by a state is immune from taxation!

Finally, *United States* v. *California,* 297 U. S. 175 holds that the Federal government may regulate the activities of

the California Board of State Harbor Commissioners, but the Commissioner himself says that the activities of that Board are immune from taxation![1]

In all of the foregoing cases, the Commissioner could conclude, as he concludes here in his brief (Brief, p. 64) that the Federal Government was "possessed of these sweeping powers". To his suggestion that the immunity of the Port Authority is "anomalous", we reply that the real anomaly is in his attempt to reconcile these immunity decisions with his theory of the effect of Federal supremacy in the field of interstate commerce.

From the foregoing decisions the fallacy of the Commissioner's contention is demonstrated. We need only point out in conclusion that the very premises upon which the contention was based were taken in error. Thus, the entire argument is based upon the assumption, (Commissioner's Brief, p. 61) that the Port Authority is engaged in, and that its bridges and tunnels are instruments of interstate commerce. On the contrary, this Court has held that the operation of interstate bridges does not constitute interstate commerce and that the capital represented by an interstate bridge is not used in interstate commerce. *Detroit International Bridge Company* v. *Corporation Tax Appeal Board,* 294 U. S. 83 (1935). In that case this Court in holding that ownership and operation of a bridge between Michigan and Canada was not engaging in foreign commerce, said (p. 86):

> "The argument for reversal is, of course, ineffective if *ownership* and *operation* of the bridge do not constitute foreign commerce.

[1] Letter addressed to Secretary of California Board of State Harbor Commissioners by the Bureau of Internal Revenue, dated August 6, 1937.

"After much consideration, and notwithstanding emphatic consent, *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 S. Ct. 532, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. * * *

"We find no adequate reason for departing from the view so expressed." (Italics ours.)

Before leaving this point it should be noted that the states have exclusive and sovereign jurisdiction of navigable waters and interstate commerce within their territorial limits, where the Federal government has not pre-empted the field. The sovereign character of this power of the states is indicated by the fact that this Court has referred to it as "plenary" and as "full power", and as "peculiarly within its (the state's) competence, even though interstate commerce is materially affected" *South Carolina State Highway Department* v. *Barnwell Bros.*, 82 Law. Ed. Adv. Ops. 469, 474; *Huse* v. *Glover*, 119 U. S. 543, 548; *Cummings* v. *Chicago*, 188 U. S. 410. "How the highways of a state, whether by land or by water shall be best improved for the public good is a matter for state determination." *Huse* v. *Glover, supra*, at 549. See also *Escanaba Trans. Co.* v. *Chicago*, 107 U. S. 678, 683. The cases on this point are completely noted by Mr. Justice Stone in *South Carolina State Highway Department* v. *Barnwell Bros.*, 82 Law. Ed. Adv. Ops. 469, 475, 476. And as to port terminal development, Congress itself has declared, as a matter of national policy, that it is essentially a state function (33 U. S. C. A. §551).

We recognize, of course, that the power of the Federal government in interstate commerce is paramount. But state activities in that field are none the less sovereign if under-

taken in the exercise of governmental duties. That the Federal government may limit the exercise of those functions does not change their nature as essential governmental functions. See *Commissioner* v. *Harlan*, 80 F. (2d) 660, 663.

But, we repeat, the Commissioner's error lies fundamentally in mistaking the *nature* of sovereignty in a dual system of government such as ours. The very division of power, the yielding of some functions by one government to the other and the reservation of others, is entirely inconsistent with any concept of absolute sovereignty in either the Federal government or the States.

POINT VII.

Taxation of the Port Authority would be a direct burden on the two States. Its functions do not constitute a withdrawal of any normal sources of Federal revenue.

The Commissioner argues that the States would not be burdened by a tax upon the Port Authority. The decisions of this Court teach that any tax on an instrumentality of government must be treated as a burden on the government itself. However, the facts here demonstrate that the tax which the Commissioner seeks to impose would directly burden the States themselves. Those burdens are detailed in the Brief submitted as Amici Curiae by New York, New Jersey, and other States (See Point IV of that Brief). It is there pointed out that the burden of Federal taxation would necessitate an abandonment of the whole Authority plan. Moreover, the Commissioner's theory would disrupt any plan of port, bridge and highway development by the States—for the Commissioner's argument goes to the functions them-

selves, as well as to their exercise through municipal instrumentalities. The revenues of the Port Authority belong to New York and New Jersey and can be disposed of only in accordance with their statutory directions. The States' appropriations of $3,000,000. for the support of the Port Authority, their advances of over $18,000,000., their direction for the pooling of the revenues of all of their interstate crossings,—all establish the burden that would be placed upon their State Treasuries. Furthermore, the States' Brief shows that a Federal tax, necessarily increasing the operating expenses of the Port Authority, will indefinitely postpone the return of the States' investment in port projects, and may impose upon them the duty of resuming annual payments of $100,000. each in support of the port program.

The Commissioner urges that the "competition" of the Port Authority's bridges and tunnels with private ferries, decreases the revenues of those ferries, and so interferes with that source of Federal revenue (Brief, pp. 45, 46). But competition does not alter the character of any activity otherwise governmental. Both the Panama Rail Road Company and the New York Department of Water Supply were necessarily in competition with private agencies and were nevertheless held immune by this Court.

The reply of the Board below brings out the entire fallacy of the "competition" argument. The Board said (R. f. 75-76):

> "This is said * * * of the destruction of private ferry competition. If these were independent profit-making ends in themselves, the argument would be more engaging. But these several operations, even though the revenues produced are substantial, are but incidental to the great and comprehensive sovereign project of im-

> proving the port * * *. The bridge and tunnel tolls and the reduction of traffic on the private ferries were incidental to the governmental project of providing highways to facilitate traffic and reduce port and harbor congestion in the common public interest. It has not heretofore been suggested that the maintenance of a free state highway was a proprietary function subject to Federal tax because it diminished or destroyed the traffic on an existing private toll road. State public school teachers are not regarded as taxable because a new public school may reduce the taxable profits of an existing private school."

The Board's opinion brings out the point perfectly. The very purpose of the two States in directing the Port Authority to construct bridges and highways across the Hudson and the Staten Island Kills, was to eliminate the economic waste and inefficiency of an antiquated ferry system. The activities simply are not comparable. This is competition only in the sense that a highway competes with a railroad. It is competition only in the sense that Rock Creek Park competes with a private amusement park, that a public library competes with a private lending library. The competition of the Post Office Department, recognized as immune in the *Brush* case, has been so keen that it has practically put the older express companies out of business. Postal savings compete directly with private banks.

The Commissioner suggests (Brief, p. 43) that the activities of the Port Authority effect a withdrawal of sources of revenue from the Federal taxing power. In attempting to prove such a withdrawal he simply points to the fact that the Port Authority has large operating revenues, and ingenuously concludes that a tax would therefore be productive (Brief, p. 45). But the productiveness of a potential

tax source is hardly a test of its governmental immunity. The Commissioner simply begs the question.

If it is the amount of gross revenues which makes the projects subject to taxation, we call the Court's attention to the fact that the gross revenues of the Postal Service for the fiscal year 1937 is $726,201,109.89, and that the compensation to postmasters alone is $48,517,995.20.[1] The revenues from tolls through the Panama Canal amounted to $24,163,569.42. The revenues from the Panama Rail Road alone totalled $14,553,291.11[2]. Are they therefore subject to state taxation?

The Port Authority does not withdraw sources of revenue from the Federal taxing power. This is clear from the entire history leading up to the creation of the Port Authority (*supra*, pp. 7-17). In contrast with other instrumentalities which have appeared before this Court, such as the Panama Rail Road Company and the New York Department of Water Supply, the Port Authority takes the place of no former taxpayer. It is carrying on a work which could not conceivably be carried on by private enterprise. Its bridges and tunnels were the first ever to span the interstate waters of the Port. The Inland Terminal system is a revolutionary development in the handling of the Port District's freight, the release of its waterfront, and the amelioration of metropolitan traffic congestion.

The execution of the Comprehensive Plan involves an investment to date of a quarter of a billion dollars—all with no prospect or possibility of return to the States, except in the health and welfare of its citizens. Indeed, much of the

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[1] Report of Postmaster General, Fiscal year 1937, page 95.

[2] Annual Report of Secretary of War, 1937, page 19.

work of the Port Authority is carried on without revenues of any sort. The studies, investigations and activities connected with harbor improvements, channels, docks, pier storage, consolidation of lighterage, free ports, and the like, all involve no income of any sort and are connected with no revenue whatsoever. It is absurd even to contend that private individuals could be found, public spirited enough to pour in the necessary hundreds of millions of dollars merely to develop the Port of New York, without benefit to themselves and entirely in the interests of the welfare of the ten million people of the Port District. The States alone could do it. The vital aid which the States have given in the form of appropriations, advances and tax exemptions, would have been impossible to a private enterprise. Any realistic approach shows that private development, along the lines of the Comprehensive Plan, was utterly impossible.

In commenting on this argument of the withdrawal of sources of Federal revenue, the Circuit Court of Appeals (*Commissioner* v. *Ten Eyck*, 76 F. (2d) 515, 519) said:

> "The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, *and is not withdrawing sources of revenue from the Federal taxing power.* It has supplanted no private business to which the Federal taxing power would normally extend." (Italics ours.)

We may also observe that this theory, that "competition" decreases Federal revenues from ferry companies, gives no consideration whatever to the fact that since the Holland Tunnel was opened in 1927 trans-Hudson traffic has increased from 16,000,000 to 30,000,000 vehicles a year, and

that consequently the Port Authority facilities have largely created their own traffic. (See R. f. 413.) It gives no consideration to the fact that the entire purpose of the two States in developing the Port of New York is to increase and to facilitate its commerce, and to make those necessary contributions to the welfare of its people as would necessarily tend to forward their general prosperity. It takes no account of the fact that the millions of dollars which have been saved, and will be saved, to the nation's shippers and to the consuming public by the work of the Port Authority, directly increases the sources, quantity and stability of Federal revenues.[1]

There can be no mistake as to the real objective of the Commissioner in these cases. It is his definite purpose to challenge the immunity of the bonds of the Port Authority, if he is successful here (R. f. 311). Indeed, the Commissioner's Brief openly declares his purpose to tax the Port Authority's revenues (pp. 45, 47, 56).

The real aim here is to open up a wide source of *new* revenue to the Federal Government—regardless of its effect on the States and regardless of its ultimate effect on the Federal Government itself. In attempting to do so by a reversal of a wide field of established precedent and constitutional principle in this Court, we respectfully submit that the Commissioner mistakes his forum. He would have better standing in following orderly constitutional processes.

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[1] The Commissioner mistakes the purpose of this observation (Brief, p. 46). We do not advance it as a reason for immunity. It is only suggested in passing, and in conjunction with our direct replies noted above in the text, as a factual denial of the Commissioner's contention that the activities of the Port Authority withdraw Federal revenue sources by reducing the earnings of ferry companies.

WHEREFORE, we respectfully submit that the decision of the Circuit Court of Appeals should be in all respects affirmed.

Respectfully submitted,

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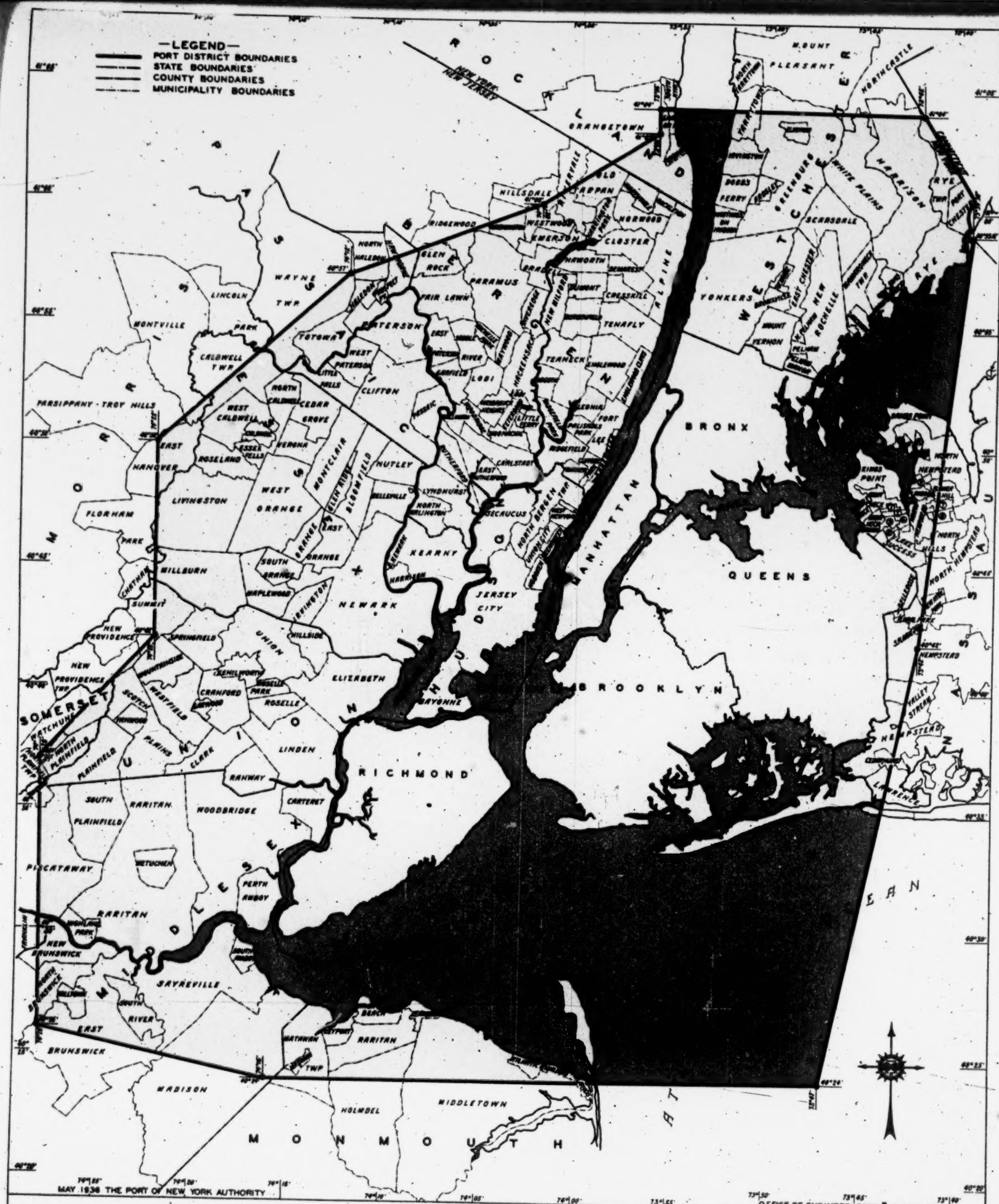
DANIEL B. GOLDBERG,
On the Brief.



THE PORT OF NEW YORK DISTRICT

(COMPACT OF 1921; ART. II)

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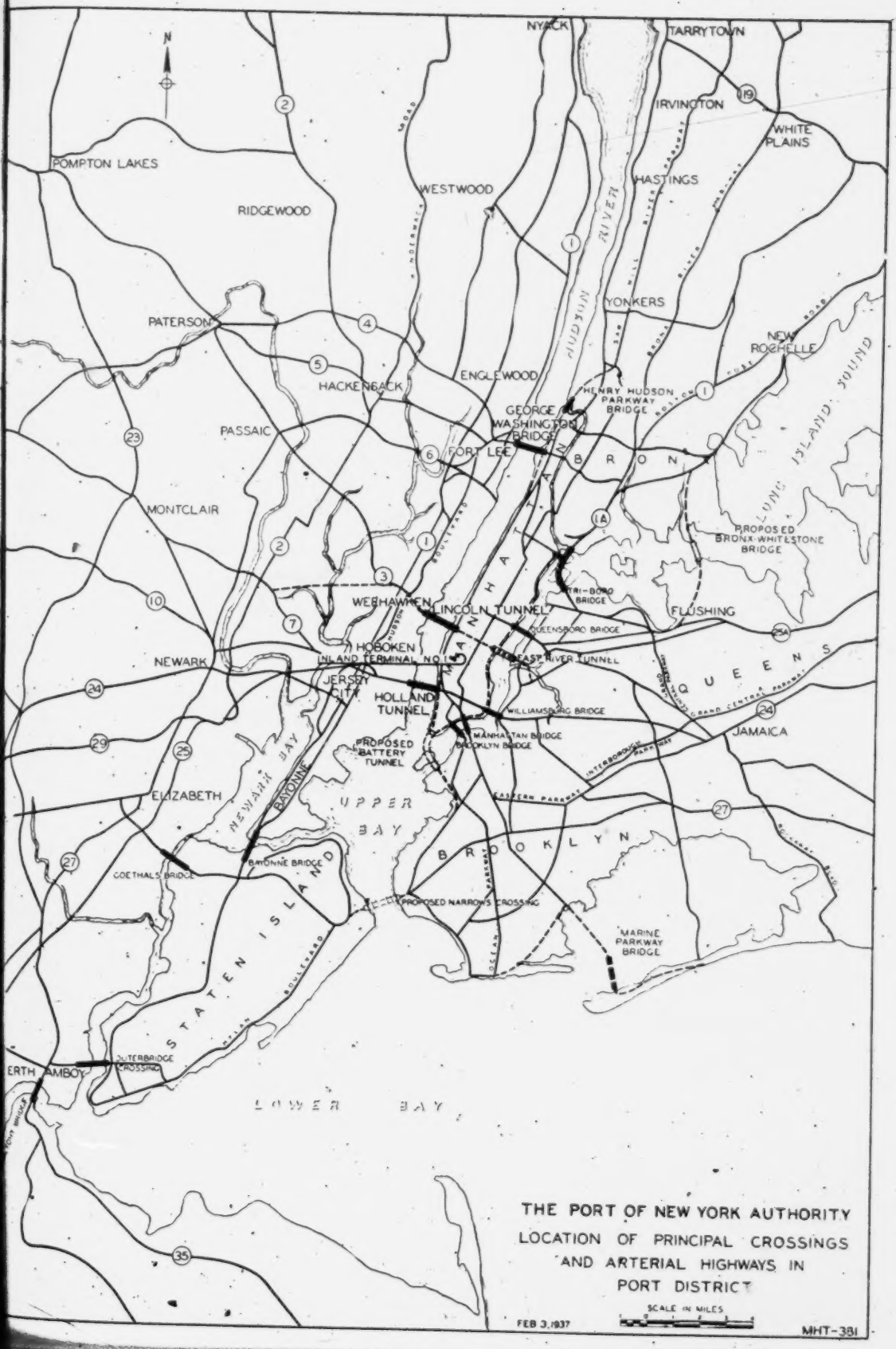

THE PORT OF NEW YORK AUTHORITY

LOCATION OF PRINCIPAL CROSSINGS AND ARTERIAL HIGHWAYS IN PORT DISTRICT

SCALE IN MILES

FEB 3, 1937

MHT-381